



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

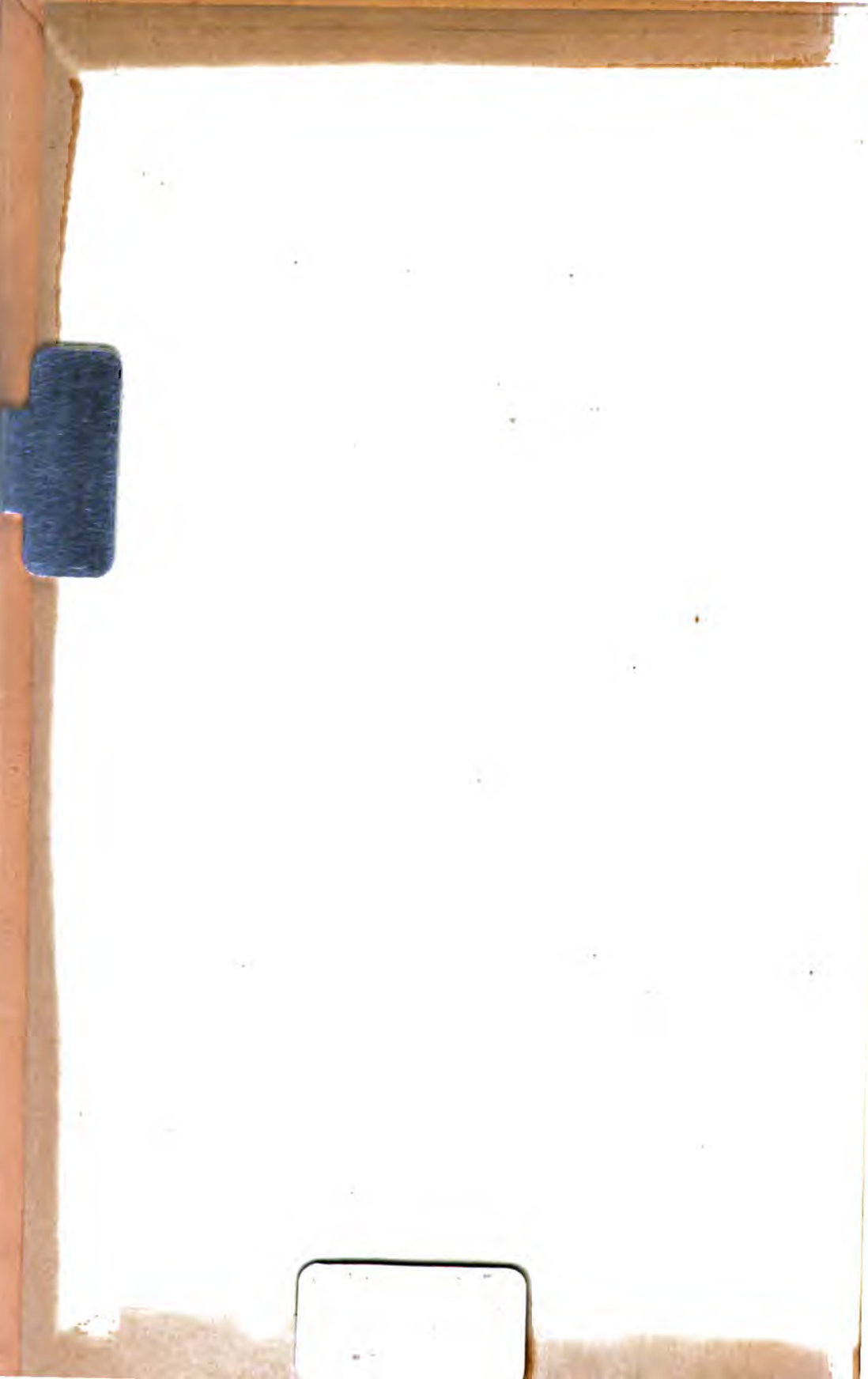
We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

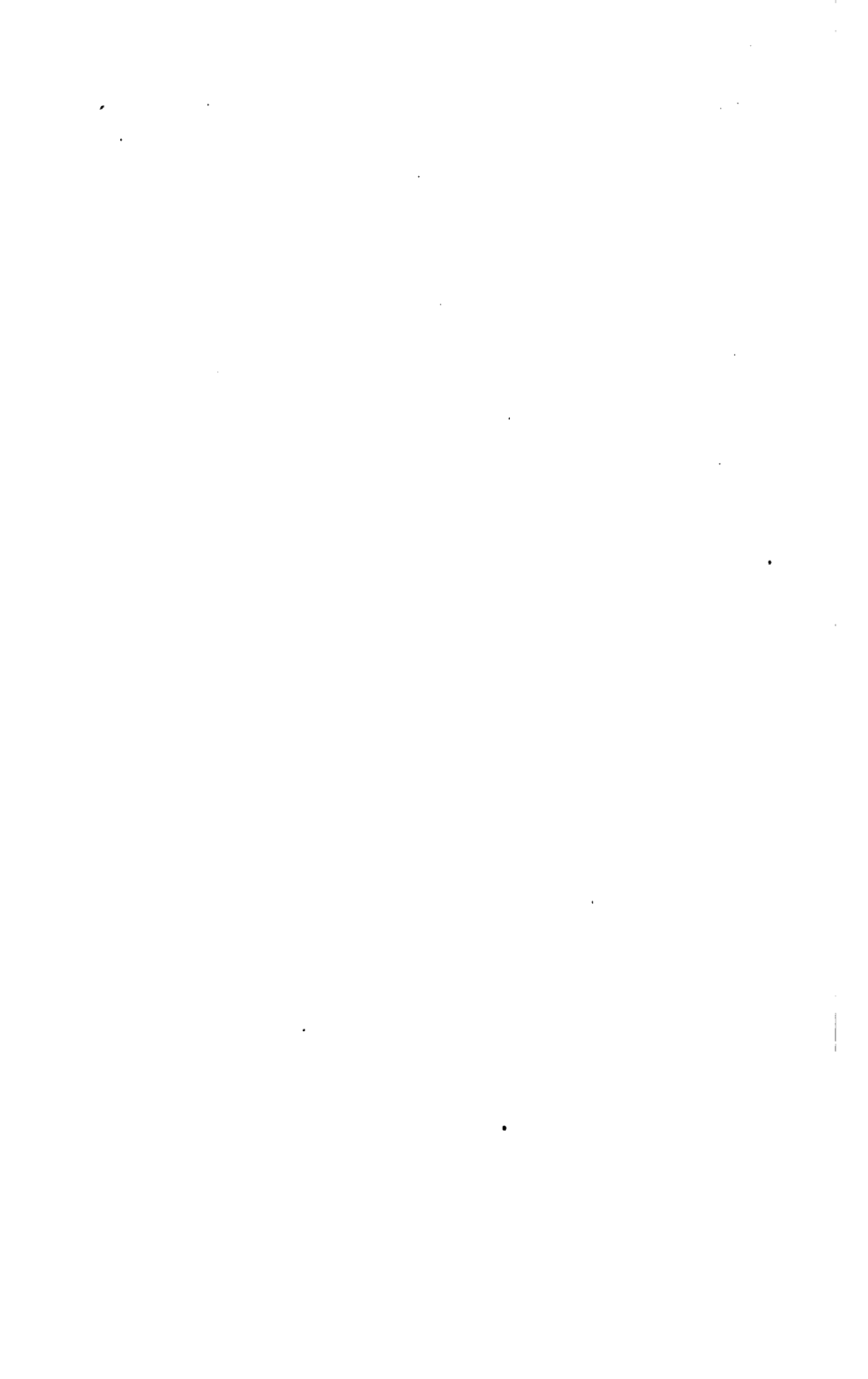
Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

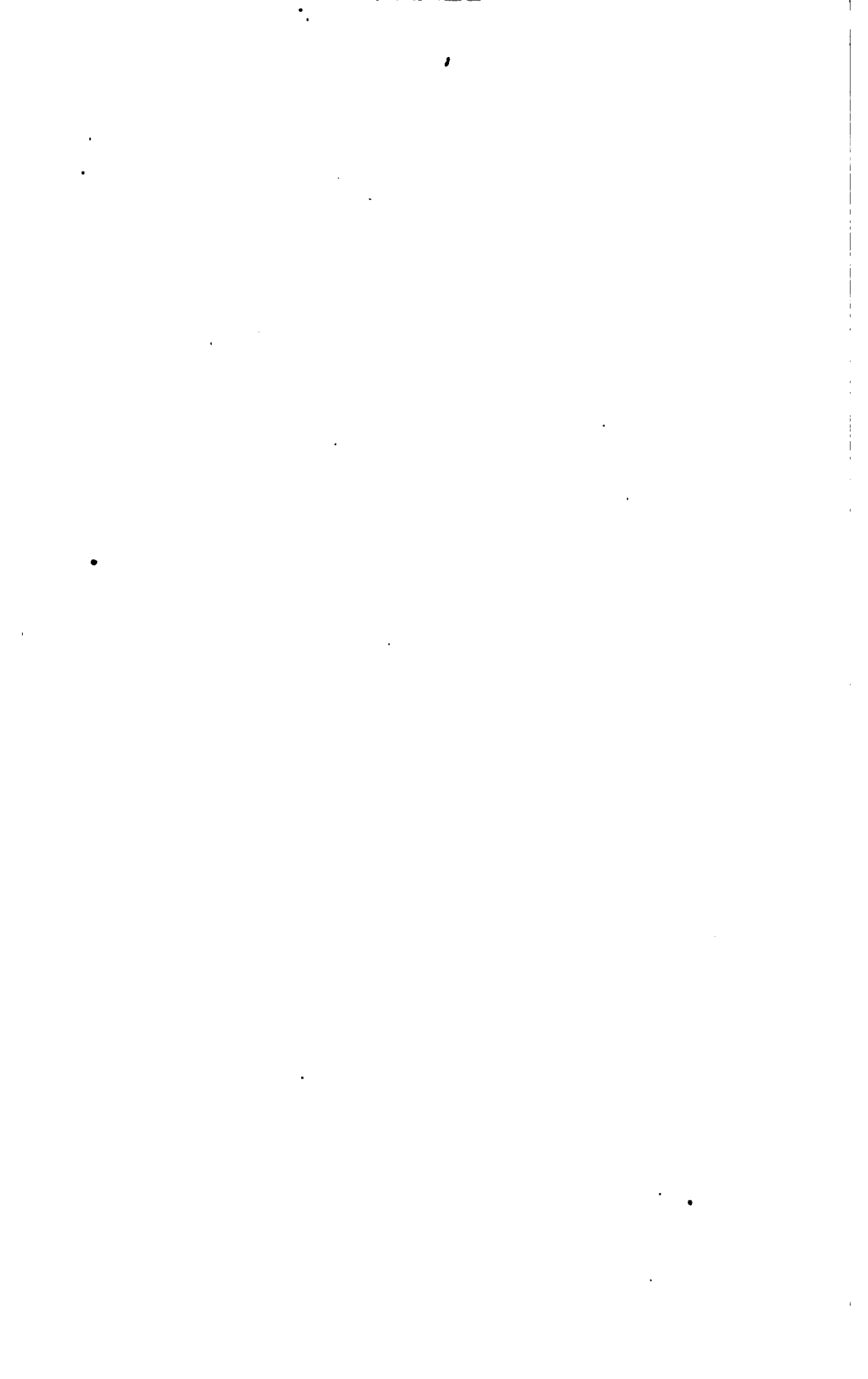
THE UNIVERSITY OF CHICAGO
PRESS



JSN
JAM
BQB

v. 2







REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF CHANCERY. •

LIBRARY OF THE
UNITED STATES OF AMERICA
DEPARTMENT OF THE ARMY
WASHINGTON, D. C.

REPORTS OF CASES
ARGUED AND DETERMINED IN THE
HIGH COURT OF CHANCERY

DURING THE TIME OF
LORD CHANCELLOR COTTENHAM.

BY
STEUART MACNAGHTEN
AND
ALEXANDER GORDON.

EDITED,
WITH NOTES AND REFERENCES TO AMERICAN LAW,
AND SUBSEQUENT ENGLISH DECISIONS,

BY
J. C. PERKINS.

VOL. II.
1849-1850.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1871.

LIBRARY OF THE
LELAND STANFORD JR. UNIVERSITY.

a. 55946

JUL 15 1901

Entered according to Act of Congress in the year 1871, by
LITTLE, BROWN, AND COMPANY,
In the Office of the Librarian of Congress at Washington.

CAMBRIDGE:
PRESS OF JOHN WILSON AND SON.

LORD COTTENHAM, LORD CHANCELLOR.

LORD LANGDALE, MASTER OF THE ROLLS,

SIR LANCELOT SHADWELL, VICE-CHANCELLOR
OF ENGLAND,

MR. BARON ROLFE,

LORD LANGDALE, MASTER OF THE ROLLS.

SIR LANCELOT SHADWELL, VICE-CHANCELLOR OF ENGLAND.

SIR JAMES LEWIS KNIGHT BRUCE, }
SIR JAMES WIGRAM, } VICE-CHANCELLORS.

SIR JOHN JERVIS, ATTORNEY-GENERAL.

SIR JOHN ROMILLY, SOLICITOR-GENERAL.

*Lords Commissioners
of the Great Seal.*

MEMORANDA.

In June, 1850, the Lord Chancellor, Baron COTTENHAM, was created Viscount Crowhurst and Earl of Cottenham; and having subsequently resigned the Great Seal, Lord LANGDALE (Master of the Rolls), the Right Honourable Sir LANCELOT SHADWELL (Vice-Chancellor of England), and Mr. Baron ROLFE, were appointed Commissioners for the custody of the Great Seal.

On the 15th July, 1850, the Great Seal was delivered to the Right Honourable Sir THOMAS WILDE, Knight, Lord Chief Justice of the Court of Common Pleas, who was thereupon created a peer by the title of Baron Truro of Bowes, in the county of Middlesex. At the same time, Sir JOHN JERVIS, Knight, her Majesty's Attorney-General, was appointed Lord Chief Justice of the Court of Common Pleas, in the place of the Right Honourable Sir THOMAS WILDE; Sir JOHN ROMILLY, Knight, her Majesty's Solicitor-General, was appointed to be her Majesty's Attorney-General, in the place of Sir JOHN JERVIS; and ALEXANDER JAMES EDWARD COCKBURN, Esq., Q. C., was appointed to be her Majesty's Solicitor-General, in the place of Sir JOHN ROMILLY, and was subsequently knighted.

A TABLE

OF THE

NAMES OF CASES REPORTED

IN THIS VOLUME.

[THE NUMERALS REFER TO THE MARGINAL PAGES.]

	Page
Adams v. The London and Blackwall Railway Company . . .	118
Alvanley v. Kinnaird	1
Attorney-General v. Andrews	225
Attorney-General, Berry v.	16
Attorney-General v. The Corporation of London	247
Attorney-General, Monckton v.	402
Bagshaw v. The Eastern Union Railway Company	389
Beresford, <i>Ex parte</i> , In re Kollmann's Railway, Locomotive, and Carriage Improvement Company	197
Berry v. Attorney-General	16
Besley, <i>Ex parte</i> , In re Direct Exeter, Plymouth, and Devonport Railway Company	176
Birkenhead, Lancashire, and Cheshire Junction Railway Com- pany, Graham v.	146
Burbidge v. Robinson	244
Cholmondeley, Cooke v.	18
Clark, Padbury v.	298
Clarke, Loader v.	382
Coleman v. Mellersh	309
Cooke v. Cholmondeley	18
Cottle, <i>Ex parte</i> , In re Wolverhampton, Chester, and Birken- head Junction Railway Company	185
Cross v. Sprigg	113

	Page
Dalglish <i>v.</i> Jarvie	231
Dimes, Grand Junction Canal Company <i>v.</i>	285
Direct Exeter, Plymouth, and Devonport Railway Company, <i>Ex parte</i> Besley	176
Direct Exeter, Plymouth, and Devonport Railway Company, <i>Ex parte</i> Roberts	192
Duncan <i>v.</i> Luntley	30
Eastern Union Railway Company, Bagshaw <i>v.</i>	389
Edwards, <i>In re</i>	134
Ellice, Forsyth <i>v.</i>	209
Elmhirst <i>v.</i> Spencer	45
Evans <i>v.</i> Prothero	319
Fairburn <i>v.</i> Pearson	144
Fooks, <i>In re</i> , In the Matter of The Wilts, Somerset, and Wey- mouth Railway Act	357
Forsyth <i>v.</i> Ellice	209
Graham <i>v.</i> The Birkenhead, Lancashire, and Cheshire Junction Railway Company	146
Grand Junction Canal Company <i>v.</i> Dimes	285
Great Western Railway Company, M'Intosh <i>v.</i>	74
Heathcote <i>v.</i> The North Staffordshire Railway Company . . .	100
Hennessy, <i>Ex parte</i> , <i>In re</i> St. George Steam Packet Company .	201
Hirst <i>v.</i> Tolson	134
Howkins <i>v.</i> Jackson	372
Inderwick <i>v.</i> Snell	216
Jackson, Howkins <i>v.</i>	372
James, <i>Ex parte</i> , <i>In re</i> Madrid and Valencia Railway Company .	169
Jarvie, Dalglish <i>v.</i>	231
Jones <i>v.</i> Lewis	168

TABLE OF CASES REPORTED.

ix

	Page
Kingston, Lorton v.	139
Kinnaird, Alvanley v.	1
Knight v. Marjoribanks	10
Kollmann's Railway Locomotive and Carriage Improvement Company, <i>In re, Ex parte</i> Beresford	197
 Lewis, Jones v.	 163
Lincoln Waterworks Company, Padley v.	68
Loader v. Clarke	382
London, Corporation of, Attorney-General v.	247
London and Blackwall Railway Company, Adams v.	118
London and North-Western Railway Company, Shrewsbury and Birmingham Railway Company v.	324
Lorton v. Kingston	139
Luntley, Duncan v.	30
 M'Intosh v. The Great Western Railway Company	 74
M'Lure v. Ripley	274
Madrid and Valencia Railway Company, <i>In re, Ex parte</i> Turner, <i>Ex parte</i> James	169
Mansfield (Earl of), <i>Ex parte, In re</i> Universal Salvage Company	57
Marjoribanks, Knight v.	10
Mayhew, Sergrove v.	97
Mellersh, Coleman v.	309
Monckton v. Attorney-General	402
 Nichols v. Ward	 140
North Staffordshire Railway Company, Heathcote v.	100
 Padbury v. Clark	 298
Padley v. The Lincoln Water-works Company	86
Pearson, Fairburn v.	144
Prothero, Evans v.	319
 Ripley, M'Lure v.	 274
Roberts, <i>Ex parte, In re</i> Direct Exeter, Plymouth, and Devonport Railway Company	192
Robinson, Burbidge v.	244

	Page
St. George Steam Packet Company, <i>In re, Ex parte</i> Hennessy	201
Sergrove v. Mayhew	97
Shrewsbury and Birmingham Railway Company v. The London and North-Western Railway Company.	324
Snell, Inderwick v.	216
Spencer, Elmhirst v.	45
Sprigg, Cross v.	113
Stark, <i>In re</i>	174
Tolson, Hirst v.	134
Turner, <i>Ex parte, In re</i> Madrid and Valencia Railway Company	169
Universal Salvage Company, <i>In re, Ex parte</i> Earl of Mansfield	57
Ward, <i>In re</i>	73
Ward, Nichols v.	140
Whitworth v. Whyddon	52
Wilts, Somerset, and Weymouth Railway Act, In the Matter of, <i>In re</i> Fooks	357
Wolverhampton, Chester, and Birkenhead Junction Railway Com- pany, <i>In re, Ex parte</i> Cottle	185

INDEX OF CASES CITED.

[THE NUMERALS REFER TO THE TOP PAGES.]

A.	Page		Page
Abdy v. Gordon	308	Bailey v. Birkenhead, Lancaster, and Cheshire Junction Railway Company	216
Adams v. Porter	246	v. Bracebrige	189
Adderley v. Dixon	123	v. Haines	189
Albert, Prince v. Strange	238	v. Macaulay	181, 189
Aldrich v. Cheshire R.R. Co.	131	v. Pearson	189
Allfrey v. Allfrey	308, 311	Baily's Case	196
Alvanley v. Kinnaird	2	Baird v. Hunter	131
Ambrose v. The Dunmow Union	90, 93	Bankers' Case	409
Anderson v. Guichard	54	Bannatyne v. Bannatyne	22
Anonymous, 1 Salk.	287	Barber, <i>Ex parte</i>	186
Anstruther v. East Fife Railway	100	Barclay's Case	169
Armistead v. The North Stafford- shire R. Co.	118, 129	Barker v. Whitworth	192
Ashby v. Blackwell	38, 42	Bassett v. Salisbury Manuf. Co.	50, 146
Atkinson v. Henshaw	54	Bateman v. Ashton, Mayor of	389
Attorney-General v. Ashburnham, Earl of	254	Bayley, <i>Ex parte</i>	134
v. Cambridge Consumers Gas Company	49	Beaumont v. Bramley	379
v. Cleaver	48, 50	Belhaven's Lord, Case	196
v. Eastlake	146	Bell v. Mexborough, Lord	181, 188, 198
v. Levi	254	Bellows v. Stone	246, 247
v. Parntner	21	Belt v. Ferguson	387
v. Pilgrim	414	Beman v. Rufford	389
v. Sheffield Gas Co.	146	Bennett, <i>Ex parte</i>	11
v. Utica Ins. Co.	50	Bernett v. Taylor	312
v. Wilson	390	Berwick, Mayor of v. Murray	244
Atwood v. Maude	133	Besley's Case	176, 196
Australasia, Bank of v. Australia, Bank of	341	Besley, <i>Ex parte</i>	185, 186, 192
		Bill v. The Sierra Nevada Lake Water and Mining Co.	109
		Binney's Case	50, 146
		Bird's Case	57
		Birkbeck Life Assurance Company <i>Re</i>	192
		Blackburn's Case	57
		Blair v. Bromley	318
		Blake v. Bunbury	304
		Blakemore v. Glamorganshire Canal Navigation	154
		Blauvelt v. Ackerman	12
		Blenkinsopp v. Blenkinsopp	244

	Page		Page
Blommart v. Player	304	Clark v. Upton	113
Bloye's Trust, <i>Re</i>	11, 12	Clements v. Todd	61, 62
Blundell v. Brettargh	134	Clifton v. Robinson	231
Bode, Baron de, <i>In re</i>	409	Coalter v. Hunter	50
Borland v. Thornton	146	Cockshott v. Bennett	113
Bouverie, <i>Ex parte</i>	164	Coe v. Lake Company	50
Boyd v. Eby	22	Cohen v. Wilkinson	154, 157, 337, 390, 392
Boyse v. Rossborough	17		378
Breed v. Pratt	21	Cole v. Gibson	38
Brice v. Brice	307	Coles v. Bank of England	146
Bridgman v. Holt	287, 290	v. Sims	139
Briggs v. Smith	146	Collard v. Smith	156, 218, 337, 341, 389
Bright v. Hutton	176, 183	Colman v. Eastern Counties Rail- way Company	259
v. North	226, 229	Combe v. London, Corporation of	169
Brighton Club and Norfolk Hotel Company, <i>Re</i>	74	Commercial Bank, <i>In re</i>	214
Briscoe v. Briscoe	307	Consequa v. Fanning	55
Britten v. Hughes	113	Const v. Barr	11
Brock v. Luckett	22	Cook v. Collingridge	179, 186
Brocklebank v. The Whitehaven Junction Railway Company	106	Cooke, <i>Ex parte</i>	17, 20
Brookfield v. Bradley	16	v. Turner	146
Brookes v. Rivers, Earl of	287	Cooper v. Hubbuck	239
Brown v. Van Dyke	308	Cory v. Yarmouth and Norwich Railway Company	181, 192, 193
Browne v. The Monmouthshire Railway and Canal Company	216	Cottle, <i>Ex parte</i>	133
Buist v. Dawes	305	Craven v. Stubbins	22
Burden v. Stein	50, 146	Creagh v. Blood	235
Burnes v. Pennell	204	Crossley v. Beverley	312
Burnham v. Kempton	50	v. Parker	11
v. Story	131	Crowe v. Ballard	21
Burrell v. Nicholson	259	Crowninshield v. Crowninshield	246
Burton, <i>Ex parte</i>	57	Cullison v. Bossom	107
v. Wookey	11	Cunliff v. Manchester and Bolton Canal Company	
Butcher v. Butcher	378		
Butricke v. Broadhurst	302		
Buxton v. James	146		
		D.	
C.		Dana v. Valentine	50
Campbell v. Gardner	10	Davey v. Prendergrass	113
v. Joyce	98	Davis v. Bank of England	38
Cane v. Allen	11	v. Getty	366
Cannock v. Jauncey	247	Daw v. Eley	246, 247
Carpenter v. Snelling	318	Dawson v. Hay	189
v. Thornton	409	De Manneville v. Crompton	386
Cartwright v. Cartwright	21	De Mattos v. Gibson	111
Castelli v. Cook	231	Denn v. Roake	301
Cauffman v. Cauffman	305, 308	Derby's, Earl of, Case	287
Chamberlain v. Lee	1	Dewar v. Maitland	307
Chapman v. Beach	143	Dietrichsen v. Cabburn	105, 106
Cheshire v. Payne	387	Dillon v. Parker	301, 304, 307
Chesterfield, Earl of v. Janssen	11	Dimes v. Grand Junction Canal	284, 285
Chetwynd v. Fleetwood	308	Disbrow v. Johnson	318
Chippendale, <i>Ex parte</i>	169	Dixon, <i>Re</i>	56
Clark v. Fisher	22	Dobson v. Land	10
v. Flint	94	Dodge v. Woolsey	389

	Page		Page
Doddsley v. Kinnersley	124	Fox v. Clifton	61, 62, 198
Doughty v. Neal	90	Freeland v. Stansfield	133
Drewry v. Thacker	287	Fremington School, <i>In re</i>	218
Duffield v. Robeson	22	Fryer v. Cooke	20
Dummer v. Pitcher	301, 304	Fuller v. Melrose	146
		v. Taylor	231
		Fulton v. Moore	305
E.			
Earl v. Lloyd	259		
Eastabrook v. Scott	113	G.	
East Anglian Railway Co. v. Eastern Counties Railway Co.	156, 389	Garey v. Whittingham	139
Eastern Counties Railway Co. v. Hawkes	389	Gates v. Blencoe	50
Eastman v. Amoskeag Manuf. Co.	50	Geddes v. Wallace	198
East and West India Dock and Birmingham Junction R.R. Co. v. Gattke	131	Gee v. Cottle	139
Edmunds v. Bird	54	George v. Bussing	305
Edwards v. Grand Junction Railway Company	339	Giddings v. Giddings	307
v. Morgan	301	Gidley v. Palmerston, Lord	409
v. Shrewsbury and Birmingham Railway Co.	216	Giffard v. Hort	16
Egerton v. Brownlow	284	Gifford v. New Jersey Railway Co.	389
Egmont v. Darell	18	Glascott v. Lang	11
England v. Downs	386	Glen v. Fisher	305
Esdaile v. Lund	287	Goble v. Grant	22
Evans v. Harris	259	Goddard v. Snow	386
v. Llewellyn	11	Goldsmid v. the Tunbridge Wells Imp. Comm.	45
v. Prothero	318	Gombault v. The Public Administrator	22
Exeter and Crediton Railway Company v. Buller	219	Goodman v. Whitcomb	144
Exeter, Marquis of v. Exeter, Marchioness of	378	Gordon v. Cheltenham R.R. Co.	146
Eyre v. Burmester	10	v. Hobart	214
		Goulding v. Baire	143
F.		Gourlay v. Somerset, Duke of	124
Fairburn v. Pearson	56	Govern v. Littlefield	318
Felkin v. Herbert, Lord	247	Gray v. Ohio and Penn. R. R. Co.	146
Ffooks v. London & S. W. R.	146	Great Charte v. Kennington	287
Finch v. Finch	308	Great Western Railway Company v. Birmingham and Oxford Junction Railway Co.	106, 339, 341
Fingal, Lord v. Blake	18	Great Western Railway Co. v. Oxford, Worcester, &c., Railway Company	146, 239
Fiske v. Framingham Manuf. Co.	131	Greenhalgh v. The Manchester and Birmingham Railway Co.	339
Fitzpatrick v. Webb	210	Greenwood v. Greenwood	247
Fitzsimons v. Fitzsimons	304	v. Penny	308
Fletcher v. Ashley	387	Gregg v. Wells	113
Flint v. Brandon	107	Gregory v. Patchett	146, 216
Flocton v. Peake	309	Griffin v. Griffin	22
Foley v. Hill	90	Gwynne v. Edwards	16
Forrest v. Manchester, S. & L. Railway Co.	389		
Forrester v. Cotton	304, 308	H.	
Foss v. Harbottle	219, 390	Hale v. Webb	138
Foster v. the Governor and Company of the Bank of England	204	Hall v. Warren	21

	Page		Page
Halley v. Webster	22	J.	
Hamblett v. Hamblett	305	Jackson v. North Wales Railway	
Hamilton v. Smith	183	Company	90
Duke v. Meynal	210	v. Vandusen	22
Harcourt v. Ramsbottom	367	Jarrett v. Kennedy	62
Harden v. Hays	22	Jenckes v. Probate Court	22
Hare v. Groves	134	Jenkins v. Gould	312
Harland v. Emerson	259	Jerrard v. Saunders	266
Harris v. Harris	247	Jervoise v. Jervoise	304
v. Tremenneere	311	Jones v. Binns	98
Harrison v. Pryse	38	v. Boston Mill Corporation	94
Haskell v. Haskell	246	v. Davis	259
Havens v. Sackett	304	v. Goodrich	54
Hawkes v. Eastern Counties Rail-		v. Jones	304
way Company	111, 389	Jopp v. Wood	15
Hawkins's Case	57	Jordan v. Black	387
Hawkins, <i>Ex parte</i>	125	Joseph & Webster, <i>Re</i>	56
Hawthorn, <i>Ex parte</i>	186, 188	Judd v. Pratt	304
Heath v. Chadwick	90	Justice, <i>Ex parte</i>	192
Heathcote v. North Staffordshire			
Railway Company	390	K.	
Heming v. Swinnerton	366, 367	Kean v. Johnson	389
Hemphill v. M'Kenna	231	Kennett Nav. Co. v. Withington	131
Hickes v. Cooke	11	Kent v. Jackson	216
Hickson v. Aylward	309	Key v. Griffin	308
Higginson v. Fabre	308	Kimble v. White Water Valley	
Hildyard v. South Sea Company	38	Canal	131
Hiles v. Moore	311, 312	King v. King	54
Hill v. Sayles	131	The King v. Hassell	254
Hilton v. Granville, Earl	231	v. Hungerford Market	
Hix v. Whittemore	22	Company	123
Hoare v. Barnes	308	v. Miles	254
Hodgson v. Powis, Earl of	160	v. Yarpole, Inhabitants	
v. Smithson	15	of	287
Hoffmann v. Postill	246, 247	Kirk v. The Guardians of the	
Hole, <i>Ex parte</i>	192	Bromley Union	90, 93
Holinsworth, <i>Ex parte</i>	179, 188	Kirkwood v. Thompson	10
Holland v. Long	247	Kitson v. Kitson	308
Holme v. Guppy	90	Knorr v. White Water Valley	
Hope v. Carnegie	139	Canal	131
Hopkinson v. Exeter, Marquis of	216		
Horlock v. Smith	311, 312	L.	
Horsfall v. Key	320	Lacey, <i>Ex parte</i>	11
Hotham v. East India Co.	90, 94	Lancaster and Carlisle Railway	
Howell v. Ashmore	246	Co. v. N. W. Railway Co.	109
Huddleston v. Briscoe	11	Lane v. Newdigate	107
Hurley v. Brown	322	v. Smith	98
Hutchinson, <i>Ex parte</i>	57	Law v. Hunter	210, 212
Hutton v. Bright	176, 183	Leavitt v. Cruger	139
v. Thompson	183	Lee v. Egremont	304
v. Uphill	176	Leeds, Duke of v. Amherst, Earl	
Hyde v. Baldwin	305	of	302
I.		Lefroy v. Gore	188
Ingilby v. Shafto	246	Lenaghan v. Smith	139
Ingraham v. Dunnell	50		

	Page
Lind v. Isle of White Ferry Co.	110
Lindo v. Lindo	378
Lingood v. Croucher	70
Little v. Price	146
Lockley v. Eldridge	134
Logan v. Simmons	387
London, Corp. of v. Att.-Gen.	247, 269
London and Brighton Railway Co. v. Wilson	62
London and North-Western Railway Company v. Smith	124
Lord v. The Governor and Company of Copper Miners	219, 390
Lynch v. Morse	318

M.

McAfee v. Ferguson	387
McCormack v. Terre Haute and Richmond R.R.	191
M'Elfresh v. Schley	304, 305
Mackenzie v. Johnston	92
Mahan v. Morgan	307
Manby v. Gresham Life Ass. Soc.	216
Manes v. Durant	387
Mansfield's Case, Earl of,	179
Mansfield, Earl of, <i>Ex parte</i>	186
Mason v. Kennebec and P. R.R. Co. v. Sanborn	131, 50
Matheson v. Ross	320, 322
Matthews v. Walwyn	309
May v. Parker	94
Mayhew v. Crickett	113
Merchant Tailors' Company, <i>In re</i>	164
Middleditch v. Sharland	309
Midland Counties Railway Co. v. Oswin	124
Miller v. Thurgood	304
Milnes v. Gery	124
Monckton v. Attorney-General	407, 408
Montesquieu v. Sandys	11, 312
Morgan, <i>Ex parte</i>	179, 197
<i>In re</i> v. Lewes	175, 311
Moss, <i>Ex parte</i>	169
Mcstyn, Lord v. Spencer	287
Mozley v. Alston	219, 390
Munro v. The Wivendon and Brightlingsea Railway Company	74
Murdock's Case	158

N.

Natusch v. Irving	219, 341
Nea v. Abbott	1
Neath and South Wales Brewery Co., The Vale of, <i>In re</i>	414

	Page
New Albany and Salem R.R. v. Connelly	131
Newman v. Payne	312
Newton v. Belcher	181
v. Rowse	137
Nockels v. Crosby	59, 61
Norfolk, Duke of, v. Tennant	118
Norris v. Cooper	183
v. Cottle	176, 183, 190
North-Eastern Railway Company v. Martin	90
Nottley v. Palmer	308

O.

Oakes v. Turquand	183
Odlin v. Gove	146
O'Neill v. Cole	387
Osborn v. United States Bank	54
Oxford's Case, The Chancellor of	287

P.

Parbury's Case	179, 188, 198
Parker v. Carter	304
Parmiter v. Parmiter	15
Patch v. Ward	247
Patteshall v. Turford	312
Peabody v. Flint	146
Peacock v. Peacock	144
Pearce v. Creswick	92
Pepper v. Hensell	98
Phelps v. Peabody	146
Philadelphia v. Davis	304, 308
Phillips v. Prichard	231
Pickard v. Sears	113
Pickering v. Pickering	311
Pillow v. Thompson	146
Pim v. Wilson	90
Pim's Case	201
Pinchin v. London and Blackwall Railway Company	231
Pitchford v. Davis	198
Pole v. Joel	56
Ponsford v. Swaine	71
Porter v. Witham	50
Prendergast v. Turton	62
Preston v. Jones	305
Price v. Penzance, Corporation of	107
Pulteney v. Warren	93

Q.

Queen, The v. The Commissioners for Paving, &c., the Town of Cheltenham	287
-------------------------------------------------------------------------	-----

	Page		Page
Queen, The v. The Governors of Darlington School	218	Simons v. Johnson	378
Queen, The v. The Inhabitants of Upton St. Leonard's	287	Simpson v. Denison	389
Queen, The v. The Justices of Hertfordshire	287	v. Howden, Lord	111, 387
Quick v. The London and North- Western Railway Company	366	Skinners' Company v. The Irish Society	269
		Sloman v. Bank of England	38
		Smith v. Althus	210, 214
		v. Beaufort, Duke of	259
		v. Goldsworthy	390
		v. Guild	305
		v. Stair and others, Earl of	254, 269
		v. Upton	409
		Snook v. Watts	22
		Solly v. Forbes	378
		South-Eastern Railway Company v. Brogden	275
		Spencer v. Spencer	387
		Spottiswoode v. Clarke	48, 238, 241
		Spring v. Russell	131
		Stainton v. Chadwick	247
		Stanley v. The Chester and Bir- kenhead Railway Company	339
		State v. Hartford and N. H. R.R.	110
		Steele v. N. M. Railway Co.	100, 109
		v. Plomer	140
		Sterling v. Livingston	27, 29
		Stevens v. South Devon Railway Company	216
		Steward v. East India Co.	70
		Stewart v. Anglo-Californian Co.	196
		Stockton and Hartlepool Railway Co. v. Leeds and Thirsk and Clarence Railway Companies	106, 390
		Stokes v. Twitchen	134, 136
		Stone v. Commercial Railway Co.	124, 125, 129
		v. Damon	21
		v. Marsh	38
		Storer v. Great Western Railway Company	106
		Story v. The Jersey City and Ber- gen Point Plank Road Co.	109
		Stoughton v. Lynch	308
		Stowell v. Flagg	131
		Stratford v. Bosworth	11
		Streatfield v. Streatfield	308
		Stroud v. Deacon	259
		Stump v. Findlay	308
		Sturgeon v. Hooker	231
		Suburban Hotel Co., <i>In re</i>	169
		Swan v. Holmes	305
		T.	
		Taff Vale Railway Co. v. Nixon	90
		Tanner v. Carter	56

R.

Ramsay v. Joyce	387
Ramsden v. Hylton	378
Rancliffe v. Lady Parkyns	304
Ranger v. Great Western Railway Company	89, 284
Reg. v. Dundalk and Enniskillen Railway	110
Reid v. Gifford	50
Reilly v. Walsh	273
Rendall v. Rendall	52
Rex v. Hornby	409
Reynard v. Spence	302
Reynell v. Lewis	181, 185, 186, 188, 189, 192, 194
Richards v. Attorney-General of Jamaica	125
Richards v. Chave	54
Ridgway v. Hungerford Market Company	219
Roberts, <i>Ex parte</i>	181
Rochdale Canal Co. v. King	146, 239
Rothschild v. Brookman	287
Rumbold v. Rumbold	302
Ruttledge v. Ruttledge	307

S.

Sadler, <i>Ex parte</i>	61
Sadler and Jackson, <i>Ex parte</i>	113
St. George v. Wake	386
Salomons v. Laing	156, 389
Samuell v. Howarth	113
Saxon v. Whitaker	22
Schroder v. Schroder	308
Scougill v. Campbell	70
Seaman v. Woods	304
Sears v. Hotchkiss	389
Seddon v. Connell	40
Senior v. Pawson	146
Sharpus's Case	57, 198
Sheriff v. Coates	235
Shove v. Wiley	309
Shrewsbury Railway Co. v. North- Western Railway Co.	389
Shuttleworth v. Greaves	302

	Page		Page
Tarleton v. Hornby	97	Walstab v. Spottiswoode	59, 62
Tash v. Adams	146	Walters, <i>Ex parte</i>	414
Tawney v. Lynn and Ely Railway Company	125	Ward, <i>Ex parte</i>	218
Taylor v. Brown	18	Ware v. The Grand Junction Waterworks Company	107
v. Chichester and Midhurst Railway Company	111, 324, 389	Waters v. Groom	10
Taylor v. Hughes	204	v. Howard	305
v. Pugh	386	v. Taylor	311
v. Rundell	244	Watkins v. Brent	54
Therman v. Abell	134	Watson v. Howard	304
Thorpe v. Hughes	275	Watts, <i>Re</i>	22
Timberlake v. Parish	304	Webb v. Portland Manuf. Co.	49
Tobey v. Chipman	318	v. Rorke	12
Todd v. Wilson	308	Weeks v. Patten	305
Tomlin v. Tomlin	210	Welby v. Welby	308
Troy v. Cheshire R.R. Co.	131	West v. Blakeway	90
Trumbull v. Gibbons	22	White, <i>Ex parte</i>	414
Tucker v. Andrews	387	v. Boston & Prov. R.R.	131
v. Sanger	18	Whitenach v. Stryker	22
Tulk v. Moxhay	106	Whitridge v. Parkhurst	307
Turner v. Robinson	97, 98	Wilde v. Gibson	11
		Wilks v. Davis	124
		Willey v. Robinson	318
		Williams v. Carle	387
U.		v. South Wales Railway	131
Union Bank v. Knapp	309	Willis v. Jernegan	311
		Wilson v. Holden	189
		v. Webber	246
V.		Wilson's Carus, Case	287
Van Bergen v. Van Bergen	50	Winch v. The Birkenhead, Lancashire, and Cheshire Railway Co.	389
Vance v. East Lanc. Railway Co.	389	Wintour v. Clifton	304
Vandaleur v. Blagrave	38	Wolesey, <i>Ex parte</i>	169
Veazie v. Dwinel	131	Wontner v. Shairp	59
Veret v. Duprez	55	Wood v. Edes	50
Victory v. Fitzpatrick	131	v. Griffith	16
		v. Hitchings	54
		v. Sutcliff	50, 146
W.		v. Waud	49
Wake v. Wake	302	Woods v. Nashua Manuf. Co.	131
Walford v. Adie	198	Woolmer v. Toby	192
Walker v. Eastern Counties Railway Company	124, 125, 131, 132	Wyld v. Hopkins	181, 185, 186, 188, 189, 192, 194
v. Walker	409		
v. Woodward	210, 212	Y.	
Waller v. Armistead	387	Yelland's Case	57
		Yetts v. Norfolk Railway Co.	216

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

ALVANLEY *v.* KINNAIRD.

1849. April 28. May 2. November 21.

If property not intended to be sold be, by the ignorance or neglect of the vendor's agent, included in a contract for sale with other property intended to be sold, a case may arise in which the Court will refuse to compel a specific performance of the whole contract; and if in such case the purchaser should decline to take so much as was intended to be sold, the course which the Court might adopt would probably be to abstain from interfering, leaving the purchaser to his remedy at law; but it certainly would not rescind the contract.¹ This course, however, cannot be followed in reference to sales under orders of the Court in which the Court must decide whether the sale is to be carried into effect or the property resold; but in these cases it is expedient, as far as possible, to adopt the rules which regulate the practice as between ordinary vendors and purchasers.

Thus, in the case of a sale under the order of the Court, it being clear that a certain portion of property was not intended by the vendor to be included in the contract of sale, the Court, in the absence of any proof of misconduct in the purchaser or his agent, refused to compel a specific performance by the purchaser excluding the portion in question.

The purchaser, however, electing to take exclusive of the portion of property in dispute, the Court ordered accordingly, and without compensation.

THIS was an application by the purchaser to discharge an order of the Vice-Chancellor of England, by which his Honor, at the instance of the vendors, set aside a sale under the circumstances hereinafter stated.

¹ See *Sugden V. & P.* (Eng. ed. 1851) 220 (7th Am. ed.), vol. 1, p. [355]; *Chamberlain v. Lee*, 10 Sim. 445; *Nea v. Abbott*, C. Coop. 333; 2 Dan. Ch. Pr. (4th Am. ed.) 1275, 1276.

* 2 * The suit of *Alvanley v. Kinnaird* was instituted in December, 1834, for the purpose of having the trusts of an indenture, bearing date the 22d March, 1825, carried into execution, these trusts being for the sale of certain estates, the property of the plaintiff, situate in the counties of Chester and Lancaster. The defendants were the trustees under the indenture.

By a decree made in the cause, some of the estates were directed to be sold, and, in pursuance of this decree, were put up to sale on the 26th September, 1842. Lot 1, which was described in the particulars of sale as "The Manor of Bredbury cum Goite, with the Court Baron to the same belonging, and all and every its rights, royalties, liberties, privileges, and advantages," was bought by T. M. Ferns, as the agent and on behalf of Josiah Howard, for 70*l*. The Master's report approving of the purchase was obtained by the purchaser and duly confirmed; and 70*l*. 17*s*. 6*d*., being the purchase-money together with interest thereon, was paid into Court under an order directing this payment and a conveyance, the conveyance to be settled by the Master if the parties differed. Discussions arose in reference to this conveyance in consequence of J. Howard claiming to have included, as part of Lot 1, all the mines and minerals belonging or appertaining to the Manor of Bredbury comprised in the deed of the 22d March, 1825. The matter came before the Master, who, considering that he had not power to decide on the claim, suspended further proceedings.

The petition, on which the order now appealed from was made, was in consequence presented by the executors of one of the creditors of the plaintiff, to whom the conduct of the suit had been

* 3 committed * by an order of the Court dated the 23d June, 1842. The petitioners, on behalf of themselves and the other parties interested in the trust estate, disputed the claim set up by J. Howard, and prayed that the purchase might be duly completed according to the intention of the vendors by excluding thereout all coal and other mines and minerals of whatever description, or that the said purchase might be annulled, and the lot in question resold.

This petition was heard before the Vice-Chancellor of England, who, by an order dated the 18th December, 1848, directed the purchase to be set aside, the property to be resold, and the purchaser to pay the costs. From this decision J. Howard now appealed to the Lord Chancellor.

The petitioners, by reference to the conditions of sale and other

evidence, including certain verbal statements made at the auction, endeavoured to show that it must have been intended to exclude all the mines and minerals in the Manor of Bredbury from the description of Lot 1, and also that the purchaser was aware of this intention. The Lord Chancellor, however, as will be seen from his judgment, thought that although it was not intended to include in Lot 1 the mines in question, yet that the terms of the particulars and conditions of sale were calculated to lead a purchaser to suppose that such was the intention; and further, that the error arose from the neglect of the vendors themselves, and that there was no evidence to rebut the assertion of the purchaser that he understood that the mines were included. Another ground relied on by the petitioners related to the conduct of T. M. Ferns, the agent of the purchaser. The particulars of alleged misconduct are noticed in the judgment of * the Lord Chancellor, but * 4 his Lordship considered that nothing was proved which could in any way affect the validity of the purchase.

Under these circumstances, and for the purpose of the present report, it appears unnecessary to go into any further statement of the facts of the case, or into any detailed account of the evidence and arguments submitted to the Lord Chancellor.

Mr. Rolt and *Mr. H. W. Cole*, for the purchaser J. Howard, and in support of the appeal.

Mr. Bethell and *Mr. Toller*, for the petitioners.

Mr. Stuart and *Mr. Lewin*, for the trustees under the deed, supported the decision of the Vice-Chancellor.

Mr. Rolt, in reply.

November 21.

THE LORD CHANCELLOR. — The appellant is a purchaser under an order of this Court of Lot 1, described thus, "The Manor of Bredbury cum Goite, with the Court Baron to the same belonging, and all and every the rights, royalties, liberties, privileges, and advantages." The petition upon which the order appealed from was made prayed that the sale might be completed excluding from the purchase in terms all coal and other mines and minerals of what-

ever description, or otherwise that the purchase might be annulled and all the orders made thereon discharged, and the purchase-money returned to the purchaser, and Lot 1 resold. By the order made upon that petition, the Vice-Chancellor of England directed * 5 that the purchase should be set aside and the property resold, and that the purchaser should pay the costs of the petitioners and of the trustees of the petitioners out of his purchase-money in Court if sufficient, and, if not, personally. It would seem to be implied from this order that the Vice-Chancellor was of opinion that the mines and minerals were included in the purchase, for otherwise the first part of the prayer would have been granted, but that their being so included had arisen from some improper conduct of the purchaser, for otherwise there could not be any ground for making him pay the costs of correcting the error.

Upon the first question, whether the purchaser of Lot 1 was entitled to any mines and minerals under lands within the Manor of Bredbury, I do not think it necessary to express any opinion, the conclusion to which I have come upon other grounds leading to the same result as if I should hold that the purchaser was not so entitled. (His Lordship here adverted shortly to the terms of the particulars and conditions of sale, and observed that, whatever might be their true construction, they were calculated to lead any purchaser to suppose that the mines of the manor were comprised in Lot 1; that the purchaser's case was, that he so understood them, and that there was no evidence to raise any suspicion that he did not.)

The ground principally relied upon by the vendors is not any conduct imputed to the purchaser personally, except that he knew that the mines were not intended to be included in Lot 1, which he denies, but to the agent he employed to bid for him. I reject all that is alleged to have passed at the sale, as to statements or explanations made that no mines were included in Lot 1.

* 6 I could not act upon the evidence as to any such statements or explanations having been made; and if they had been clearly proved, they would not have been received by me as affecting the question I have to decide.

The agent, however, may have so misconducted himself in this agency, as to affect his principal. It is to be observed, that the agency commenced only the moment before the sale, he having been called out of the auction room by the purchaser, and was then

for the first time authorized to bid for him; and this agency, so far as it can affect the present question, terminated the moment the first lot was declared to have been purchased by this agent, which he so purchased for the appellant. The misconduct of an agent to affect his principal must occur in the exercise of his agency; but in this case, the agency consisted only in bidding for Lot 1. It is said that this agent must have known that the mines were not intended to be included in Lot 1. If he had such knowledge, the purchaser might complain that he had not imparted it to him, and so have prevented his bidding for what he was not likely to obtain; but he denies that he had any such knowledge, and one of the facts alleged as proof that he had, seems to me to lead to an opposite conclusion. It is said that there was a former attempt to sell this property, that this agent was cognizant of the transaction, and that all mines, &c., were in the particulars and conditions used on that occasion expressly excluded. Would not the obvious inference, from the distinct exclusion having been before thought necessary and at the latter sale abandoned, be, that the intention had been altered, and that no such general exclusion was intended? As to the fact that this agent so bidding for the purchaser had, whilst the property was in the hands of the trustees, been employed as the country agent in the management of the property, and *that in preparing the particulars of sale, the parties *7 who had the conduct of the sale had availed themselves of his knowledge so obtained, I cannot see how that incapacitated him from bidding for a stranger. His employers, the trustees, were not the parties selling, that duty having been intrusted by the Court to others: he had no duty to perform except to attend and watch the proceedings for the trustees; and there is no imputation or proof that in the information he gave as to the particulars, he acted fraudulently or with any view to forward any scheme of the purchaser, whose agent he was not then for the purposes of the purchase, and who had not at that time any intention of bidding; nor does it indeed appear that he gave any information which was not correct; and, although he saw the particulars of sale, he denies that he ever saw the conditions; and it was by the ninth condition of the former attempt to sell that the reservation of the mines was provided for. The framers of these very inaccurate particulars and conditions cannot charge him for not having discovered and corrected their errors and blunders, which, not having

seen the conditions and not having been consulted, he had not the means of doing.

It does not appear to me, therefore, that there is any ground for setting aside this purchase upon the conduct of the purchaser or of his agent; but I think it clear that the vendors did not intend to sell under Lot 1 any mines or minerals under any lands within the manor. There was much neglect and want of attention on the part of some of those who acted for the vendors. (His Lordship here explained how, in his opinion, the error arose.)

If property not intended to be sold be, by the ignorance or * 8. neglect of the vendor's agent, included in a contract * for sale with other property intended to be sold, a case may arise in which the Court would refuse to compel a specific performance of the whole contract; and if in such case, the purchaser declined to take so much as was intended to be sold, the course which the Court might adopt would probably be to abstain from interfering, leaving the purchaser to his remedy at law; but it certainly would not rescind the contract. This course, however, cannot be followed in sales under orders of the Court: the property must be sold, and the Court must decide whether the sale is to be carried into effect or the property resold; but it is expedient, as far as possible, to adapt the rules which regulate such cases between vendor and purchaser to the case of purchases under orders of the Court.

I have already said that I see no ground for setting aside the purchase; but I think also that a specific performance of the purchase of Lot 1, including the mines, cannot be enforced; and if the particulars and conditions include the mines in Lot 1, I do not think that the purchaser could be compelled to complete his purchase excluding the mines; but this difficulty will not I apprehend arise, it having been stated that if I should be of opinion that he could not have the mines included, he would take the manor excluding them; and that is the conclusion to which I have come. The purchaser, under these circumstances, electing to take the manor without the mines, must take it without compensation: it would indeed be impossible to appreciate the amount, and he has not claimed it; and I think if he had, I could not have given him any. If the evidence as to what passed at the sale be true, the biddings of others must have been made for the manor without the mines; and though the actual purchaser could not be

directly affected with what was so stated, the price * he * 9 agreed to give, being regulated by the other biddings, must have been affected by what influence such other biddings: any compensation, therefore, would be deducted from the price agreed for, which, in fact, did not include it. I am, therefore, of opinion, that the purchaser is entitled to Lot 1 for the price bid for him, but with an exclusion of the mines; and that the Master should be directed to settle the conveyance accordingly.

As to costs, I have said that I saw no ground for making the purchaser pay the costs of the petition and order. My doubt has been whether he ought not to be paid his costs, upon the ground that the proceeding was to correct an error of those who acted for the vendors; but although that is the case, yet, as the purchaser claimed a benefit from such error, when he might and I think ought to have seen that, whatever his intentions were, the intention of the vendors was to exclude the mines from Lot 1, and by timely conceding what I think he must submit to, might have avoided the greater part of the costs in question, I think that the proper course will be to make the order upon the petition without costs. The vendors and trustees will have their costs out of the general fund.

The order will be to discharge the order of the Vice-Chancellor; and reciting that the purchaser is willing to take Lot 1 at the price offered, with an express exclusion of the mines, &c., the Court being of opinion that he is not entitled to have the mines, &c., included in the purchase of Lot 1,—let the Master settle the conveyance accordingly.

* KNIGHT v. MARJORIBANKS.

* 10

1849. November 14, 16, 17, 19, 20, 26.

The decision of the Master of the Rolls, 11 Beav. 322, affirmed.

The circumstance that two parties stand to each other in the relation of trustee and *cestui que trust* does not affect any dealing between them unconnected with the subject of the trust.

Thus the rule that a trustee cannot purchase from his *cestui que trust* does not extend to a purchase by a mortgagee from his mortgagor.¹

¹ See Sugden V. & P. (14th Eng. ed.) 698; (7th Am. ed.) 2 vol. p. [888],

THE facts of this case, which were very complicated and of which the following is a short outline, are fully stated in the judgment of the Master of the Rolls, in the 11th volume of Mr. Beavan's Reports, p. 322.

Colonel Lautour, in partnership with S. Marjoribanks and three other persons, embarked in a land speculation in New South Wales. The firm of S. Marjoribanks & Co. were the London agents of this concern. In 1829, Colonel Lautour was considerably in arrear with respect to his proportion of the requisite funds for the undertaking; and in August, 1829, he executed a deed, whereby he conveyed his share to S. Marjoribanks & Co., in trust to secure the amount due from him to the concern, and subject thereto in trust for himself; and he covenanted not to interfere in the control and management of the concern. In 1831, he entered into an agreement to sell his share in the concern to his copartners, in consideration of the sum in which he was indebted, and of a further sum of 250*l.*, of which he received part-payment. The deed carrying this agreement into effect was not executed till May, 1836, the cause of this delay being the bankruptcy of Colonel Lautour. The assignees disclaimed all interest in the concern; and in 1839, Colonel Lautour, having obtained from them an assignment of his interest, filed the present bill to set aside the deeds of 1829 and 1836, on the ground of fraud.

The cause was heard before the Master of the Rolls in June and July, 1848, and on the 10th November, 1848, his Lord-
* 11 ship pronounced judgment, dismissing* the bill with costs.

From this decision the plaintiff now appealed to the Lord Chancellor.

Mr. Elderton, Mr. J. V. Prior, and Sir F. C. Knowles, for the plaintiff.

Mr. Turner, Mr. R. Palmer, and Mr. Cotton, for the principal defendants.

The following cases were referred to and commented upon in the [889]; *Waters v. Groom*, 11 Cl. & Fin. 684; *Dobson v. Land*, 8 Hare, 220; *Campbell v. Gardner*, 3 Stockt. (N. J.) 423; 2 Dan. Ch. Pr. (4th Am. ed.) 1291, in note; *Eyre v. Burmester*, 12 W. R. 993; *Kirkwood v. Thompson*, 13 W. R. 1053; 2 H. & M. 292; 2 De G., J. & S. 613; *Shaw v. Bunny*, 33 Beav. 494; 2 De G., J. & S. 468; *Ford v. Olden*, L. R. 3 Eq. 461; 1 Dart V. & P. (4th Eng. ed.) 29, 30.

course of the argument: *Huddleston v. Briscoe*, (a) *Stratford v. Bosworth*, (b) *Earl of Chesterfield v. Janssen*, (c) *Crowe v. Ballard*, (d) *Burton v. Wookey*, (e) *Ex parte Bennett*, (g) *Ex parte Lacey*, (h) *Montesquieu v. Sandys*, (i) *Hickes v. Cooke*, (k) *Cane v. Allen*, (l) *Evans v. Llewellyn*, (m) *Cook v. Collingridge*, (n) *Glascott v. Lang*, (o) *Wilde v. Gibson*, (p) *Re Bloye's Trust*. (q)

November 26.

THE LORD CHANCELLOR, after recapitulating the facts of the case and commenting on the circumstance,] that although by the bill the transaction of 1831, which constituted the contract, was not impeached, yet that the deed which carried that contract into effect was impeached, observed,—that the only ground which could be relied on for setting aside the transaction, was the assumption that this was a purchase by a trustee of his *cestui que trust*. His Lordship then proceeded:—

* It is not contended that a trustee cannot, under any * 12 circumstances, buy of a *cestui que trust*; but it is said there are certain duties and obligations imposed by equity on a trustee so dealing, which have not been observed by those who agreed to purchase Colonel Lautour's interest, and therefore that, the relative situation of trustee and *cestui que trust* being in existence, the contract entered into is affected by circumstances which would have had no bearing on it at all unless that relative situation were first established.

Now what was the relation in which Mr. Marjoribanks stood in reference to Colonel Lautour? Mr. Marjoribanks, it is true, had a share in the concern; but this was totally distinct from acting as broker or manager of the estate, a character which was filled by the firm in which, however, he was a partner. To this firm the property was, in August, 1829, conveyed in trust to sell; and it is true that if the sale had taken place, the parties executing the trust would have been affected by all the equities which protect *cestui que trusts* against the acts of their trustees. Now, what

(a) 11 Ves. 583.

(b) 2 V. & B. 341.

(c) 2 Ves. 125.

(d) 1 Ves. Jr. 215.

(e) 6 Madd. 367.

(g) 10 Ves. 381.

(h) 6 Ves. 625.

(i) 18 Ves. 302.

(k) 4 Dow, 16.

(l) 2 Dow, 289.

(m) 1 Cox, 333.

(n) Jacob, 607.

(o) 2 Phil. 310.

(p) 1 H. L. Cas. 605.

(q) *Ante*, Vol. I. p. 488.

are those equities? The trustee selling is bound to procure the best price he can for the property, and the law will not permit him to put himself in a situation where his interest would be inconsistent with his duty. He must not, therefore, surreptitiously, and without the knowledge of the *cestui que trust*, bid at an auction either in his own name or by anybody for him; nor can he therefore in such a case be recognized as a purchaser.¹ This is the rule in the case of a trustee; and its object is to secure the due execution of the duty which the trustee takes upon himself to perform; but if the question arises as to some other dealing unconnected with the trust, then the circumstance of a trust

having been undertaken but not acted upon, can in no way * 13 affect* such other dealing, if in itself unobjectionable. I

threw out an observation to this effect in the course of the argument, having a strong impression and recollection that such a distinction had been taken; and I find that it was taken long ago, and has been acted upon to the present time. I will state what Sir EDWARD SUGDEN says on this subject. Speaking of the rule that a trustee cannot purchase from a *cestui que trust*, he says, (a)* "The rule has never been applied to a purchase by mortgagee from the mortgagor, and it is to be hoped that it never will:" then he refers to a case of *Webb v. Rorke*, (b) a decision of Lord REDESDALE's, which is the strongest case against such a transaction, and where he, Lord REDESDALE, excepts this very case from the rule which he is laying down and laying down very broadly, and under which he held that a mortgagee could not take a lease from his mortgagor, because they were not on an equal footing, one being under the pressure of debt, and the other having all the influence which a creditor has over his debtor. Sir EDWARD SUGDEN, though not entirely approving of the doctrine as thus laid down, but with every inclination to carry the rule as high as possible, makes an exception from it of the case of a mortgagor and mortgagee, and says, there must be misconduct to impeach such a transaction, and then adds, that "a sale by a mortgagor to a mortgagee stands on the same principle as a sale between parties

(a) Sugden V. & P. vol. iii. p. 227 (ed. 10).

(b) 2 Sch. & Lef. 661.

¹ *In re Bloye's Trust*, 1 M'N. & G. 495, note (2) and cases cited; 1 Lead. Cas. Eq. (3d Am. ed.) 172 [92], and notes; *Blauvelt v. Ackerman*, 5 C. E. Green (N. J.), 146.

having no connection with each other, and can only be impeached on the ground of fraud," and that inadequacy of price would not be a sufficient ground to impeach a sale.

If this be so, then the only ground upon which the plaintiff relies, fails, the relative position of trustee and **cestui que* * 14 *trust* not having existed, there being nothing like proof of fraud as between a vendor and purchaser, and the question of value being immaterial. Now the decision of Lord REDESDALE, upon which it is unnecessary for me to express any opinion, clearly shows that when enforcing the general rule, and carrying it further than it had ever been carried before by setting aside a transaction between *cestui que trust* and trustee, he still thought it necessary to except the case of mortgagor and mortgagee. In the present case, there is nothing but a release of the equity of redemption; and it cannot be said that a man who has mortgaged his estate is never to be permitted to get rid of the debt by releasing the equity of redemption. There is no other party with whom a mortgagor can deal; and if a mortgagee is to be considered a trustee for that purpose, and the rule as between trustee and *cestui que trust* to be applied, it would be impossible for a mortgagor ever to get rid of his debt by releasing the equity of redemption. The consequence is so monstrous that it shows how untenable the proposition is to endeavour to extend the rule to a transaction between mortgagor and mortgagee. It was so felt by Lord REDESDALE, and it is distinctly expressed by Sir EDWARD SUGDEN that he trusts the time never will come when the doctrine shall be so extended. It cannot be necessary to say any thing farther on that subject.

Then here is a transaction not at all connected with the trusteeship. It is true the legal estate is in Marjoribanks, which is nothing at all to the purpose, for the dealing has reference to the contract of 1831, and has no connection with the subject of the trust to sell; it was not a sale to third persons, and required therefore no assistance from those who were authorized to sell, and whose duty it was to obtain the best price; it was a * deal- * 15 ing between the owner of the estate on the one hand, and the party having a lien upon the estate on the other, for the purpose of settling between themselves what the amount of the debt was. Now that, like every other transaction, is open to be impeached on the ground of fraud; but this fraud must not be of that species which is referable to dealings between trustee and *cestui que trust*,

but only of that species on account of which a transaction between ordinary vendors and purchasers might be set aside. It must, therefore, be shown either that there was misrepresentation, or that there was suppression of that which the party was bound to communicate; in short, such a case must be shown as would have impeached the transaction if it had taken place in the ordinary manner between parties who were strangers to each other. (His Lordship here, adverting to the question of value, commented on various facts in the case, and observed that it appeared to him that full value had been given.) Now as to the alleged fraud, the only evidence is, that the defendants, the other partners, had from time to time information which Colonel Lautour did not possess, and that they did not, as it is contended they ought to have done, communicate that information to him; but no such duty appears to me to have existed; and both parties seem to have been upon a very equal footing as to information with reference to value.

His Lordship then, after referring to the facts that ever since December, 1831, Colonel Lautour was urgent for the completion of the contract and for the payment of the 250*l.*, part of which he had then received, that no complaint was made until 1839, and that the other shareholders had for a period of seven or eight years

borne all the burden of feeding and supporting the speculation, concluded as follows: Under such circumstances * a very strong case of fraud would be required to set aside any transaction; but I am clearly of opinion that here no such case is made out. I find no breach of duty by his partners towards Colonel Lautour, and no fraud practised; but I find a bill filed containing imputations of the grossest kind, which have not been proved. The appeal must be dismissed with costs.

BERRY v. THE ATTORNEY-GENERAL.

1849. November 22, 26.

Where a party, not being a party to the suit, desires to have the same reheard, he must apply to the Court in the first instance for permission to present a petition of rehearing.¹

¹ 2 Dan. Ch. Pr. (4th Am. ed.) 1345; *Hodgson v. Smithson*, 2 W. R. 699, L. JJ.; *Farmiter v. Farmiter*, 2 De G., F. & J. 526; *Jopp v. Wood*, 12 W. R. 393.

THIS was a motion on behalf of the plaintiff to discharge an order, bearing date the 8th November, 1849, by which, on the petition of Elizabeth Scrivener, the cause was directed to be set down to be reheard before the Vice-Chancellor KNIGHT BRUCE.

The plaintiff was administratrix, with the will annexed, of the testator William Upcott; and by the decree made at the hearing of the cause, a receiver was appointed and the usual accounts directed. The Master made his report, and the cause was subsequently heard on further directions when, the testator's estate being insufficient for the payment of his debts and legacies, an order was made, dated the 9th June, 1848, for the payment of the debts, and, after payment thereof, for the apportionment of the residue among the legatees. The debts were paid, and the residue was apportioned accordingly.

In the course of these latter proceedings, E. Scrivener, who was one of the legatees, discovered that various * errors * 17 existed in the accounts as taken before the Master; and in consequence of this discovery, she presented a petition praying that the cause might be reheard, on further directions, before the Vice-Chancellor KNIGHT BRUCE, and that the order of the 9th June, 1848, might be reversed, or varied, or altered. This petition was presented to the Lord Chancellor, and was answered in the usual manner, and an order drawn up accordingly, which order the plaintiff now sought to discharge.

Mr. J. Parker and *Mr. Torriano*, for the motion. — The order is clearly irregular; the petition ought to have prayed for liberty to present a petition of rehearing, and not that the cause should be reheard. *Wood v. Griffith*, (a) *Gwynne v. Edwards*. (b)

Mr. Malins and *Mr. Roxburgh*, contra, endeavoured to distinguish the present case from that of *Gwynne v. Edwards*; (b) and cited, in support of the order, *Giffard v. Hort*, (c) *Brookfield v. Bradley*. (d)

Without calling for reply,

THE LORD CHANCELLOR. — In the absence of any authority, I should say that this order is irregular, for otherwise any one,

(a) 19 Ves. 550.

(c) 1 Sch. & Lef. 409.

(b) 9 Beav. 22.

(d) 2 S. & S. 64.

though not a party, might come and ask to have a suit reheard. In certain cases, indeed, the Court takes the conduct of a suit from the plaintiff in favour of another party, but such party must come to the Court and establish a case. If, however, the *18 order made in the present instance *were right, the proceeding just referred to would become a matter of course, and this it clearly is not. The only remedy for a party similarly circumstanced to the petitioner here, is in the first instance to apply to the Court for permission to have the cause reheard.

In the absence, therefore, of any authority to the contrary, and with the authority of the case before the Master of the Rolls, laying down a rule which seems to me to keep suitors within proper bounds, I think that the petition presented was irregular; and that the order must therefore be discharged, and the petition taken off the file, with costs.¹

COOKE v. CHOLMONDELEY.²

1849. November 28, 29.

A testator, being subject to a commission of lunacy, gave by his will certain benefits to his only daughter, a married woman, who was also his heiress-at-law, and declared that if she or her husband, or any person on their or either of their behalf, should dispute his will, or if any proceedings should be taken by any person whomsoever, by any possible result of which any estate or interest could be in any way attainable by his daughter or her husband of larger extent than was intended for her by the will, and she and her husband should not formally disavow, stay, or resist such proceedings to the best of their ability, then he revoked the benefits given to her. The heiress-at-law, on occasion of her marriage and during her minority, had joined with her husband in assigning her expectant interest to the trustees of her marriage settlement. The trustees of the will filed their bill to have the will established and the trusts carried into execution, and adduced proof of the sanity of the testator at the date of his will: to this suit the heiress-at-law and the trustees of the settlement were made parties. *Held*, without deciding on the validity of the settlement, that the plaintiffs were bound to prove their title as against the trustees of the settlement, and the Court accordingly, at the instance of these trustees, directed an issue *devisavit vel non*.³

¹ 2 Dan. Ch. Pr. (4th Am. ed.) 1362.

² S. C., 11 Jur. 702, V. C. E.; S. C., *nom.* Cooke v. Turner; 15 Sim. 611.

³ See 2 Dan. Ch. Pr. (4th Am. ed.) 968, 969; Boyse v. Rossborough, 3 De

In order to protect the heiress-at-law from the clause of forfeiture contained in the will, the Court directed a statement to be inserted in the order that the issue was directed at the instance of the trustees of the settlement.

A FULL report of this case, as heard before the Vice-Chancellor of England, will be found in the 15th volume of Mr. Simons's Reports, p. 611.

* Sir Gregory Osborne Page Turner, the testator in the * 19 cause, by his will devised his estates to the plaintiffs as trustees, and thereby gave certain benefits to his only daughter Helen Elizabeth Fryer, who was his heiress-at-law, then the wife of the Reverend Charles Gulliver Fryer, and declared that if she or her husband or any person, on their or either of their behalf, should dispute his will, or if any proceedings should be taken by any persons whomsoever by any possible result of which any estate or interest could be in any way attainable by his daughter or her husband of larger extent than was intended for her by the will, and she and her husband should not formally disavow, stay, or resist such proceedings to the best of their ability, then he revoked the benefits given to her.

In the year 1814, a commission of lunacy issued against the testator, which was superseded in 1815, but in 1823 a second commission issued, which remained in force without any attempt to disturb it until the period of his death in 1844.

In 1847, the trustees filed their bill for the purpose of having the will established, and the trusts of it carried into execution, making the heiress-at-law and her husband the trustees of their settlement, the testator's widow, and his nephew Sir E. H. P. Turner (who was also his heir male), parties to the suit. The widow and Sir E. H. P. Turner admitted the validity of the will, and claimed under it. The plaintiffs in the suit proved the sanity of the testator at the date of his will, and no evidence was adduced to the contrary. The Vice-Chancellor, however, at the hearing of the cause, held that one of the trustees of the marriage settlement of the testator's daughter (with whom the husband had entered into a covenant during the * infancy * 20 of his wife, and in the lifetime of her father, to make a settlement of any estates to which she might thereafter be entitled)

G., M. & G. 817; Kay, 71; 18 Jur. 205; 3 Jur. N. S. 373; 1 K. & J. 124, 502; Taylor v. Brown, 10 W. R. 361, M. R.; Egmont v. Darell, 1 H. & M. 563; Lord Fingal v. Blake, 1 Moll. 113; Tucker v. Sanger, 1 M'Cl. & Y. 425.

"had an interest which enabled him to stand forward as the advocate of the truth of the case," and upon the application of this trustee, his Honor, without hearing the daughter or her husband, considered that he was bound to direct an issue *devisavit vel non*, in which issue the trustee of the marriage settlement was to be the defendant.

The defendant Sir E. H. P. Turner appealed from this decision, first, on the ground that the title of the trustee was not sufficiently established in the cause to entitle him to demand the issue; secondly, because, if the issue were directed, the daughter and her husband, and not the trustee, ought to have been made the defendants, or, if not, that it ought to have appeared by the decree that they had waived and declined such issue, in which case no issue ought to have been directed; and, lastly, that the issue as directed would not be finally binding and conclusive on all parties.

Mr. Freeling, for the plaintiffs, the trustees of the will, stated that there had been a case sent for the opinion of the Court of Exchequer as to the validity of the proviso in the will; and that that Court had pronounced its opinion that the proviso was good: *Cooke v. Turner*; (a) that immediately thereupon a deed of confirmation had been tendered to Mr. and Mrs. Fryer for their execution, but that they had declined to execute such deed; that the trustees of the marriage settlement of Mr. and Mrs. Fryer had filed their bill against the devisees to have the articles established, and that a demurrer to this bill had been allowed by the Master of the Rolls.

Having stated these facts he took no part in the argument.

* 21 * *Mr. Stuart, Mr. J. Parker, and Mr. Lewin*, on behalf of

Sir E. H. P. Turner, contended, that it was not competent for the Vice-Chancellor to have directed an issue which was not required by the only person (the heiress-at-law) entitled to ask for such issue; that if the issue were tried in the form in which it now was shaped, it might turn out to be wholly ineffectual, and could not be binding on the heiress, who was no party to it; that inasmuch as the articles were executory and affected to bind an infant by her covenant, they were clearly voidable, if not void; that the rule of the Court, when the heir-at-law neither asks nor declines an issue, is to declare the will established; that the demand of the trustee being consequent on the validity of the articles, and the bill to establish the articles having failed, *Fryer v. Cooke*, (b) the trus-

(a) 15 M. & W. 737.

(b) 12 Law J. Ch. 487.

tee had clearly no *locus standi*. They submitted that it was proved by the witnesses that the testator was of sound and disposing mind when he made the will, and, therefore, that a decree ought to have been made establishing the will and directing its trusts to be carried into execution. They cited *Cartwright v. Cartwright*, (a) *Attorney-General v. Parnter*, (b) *Hall v. Warren*. (c)

Mr. Bethell, *Mr. Lee*, and *Mr. Saunders* appeared for the trustee of the settlement, and were informed by the Lord Chancellor that he would consider whether it was necessary for him to call upon them to support the order of the Vice-Chancellor.

Mr. Willcock, for the heiress-at-law.

Mr. Teed, and *Mr. Nelson Matcham*, for the other defendants.

* On this day, without calling upon counsel in support of * 22 the order appealed from, the Lord Chancellor delivered the following judgment:—

THE LORD CHANCELLOR. — Since yesterday I have had an opportunity of considering this case, which certainly is one of the greatest possible importance, not only, it may be, to the parties in the cause, but to the general practice of the Court; and the result is, that I cannot accede to the proposition made by the appeal, or alter the decree in the way proposed.

A lunatic, who for a great number of years had been under the protection of this Court, dies; and it then appears that, pending the lunacy, and while the commission was in full force, he made a will. That fact, however, does not of necessity show that the will is not a good will, for it is very possible that there may have been a period during which it was competent for the testator to make a will, and that such a will might be valid, though the commission existed. The existence of the commission is, no doubt, a circumstance of extreme suspicion, and one which gives rise to the strongest presumption against the validity of the will; but this presumption is nevertheless capable of being rebutted.¹ If this were all, the

(a) 1 Phillim. 90.

(b) 3 Bro. C. C. 441.

(c) 9 Ves. 605.

¹ The English and American cases concur in this view. See *Breed v. Pratt*, 18 Pick. 115; *Stone v. Damon*, 12 Mass. 488; *Crowninshield v. Crowninshield*,

case would not be very peculiar, or attended with any difficulty ; but this document, which is produced as a will, — whether it be a will or not I am not at present in a situation to know, — contains a provision that any party disputing, or taking any steps to dispute the will, shall lose all benefit under it. Now, one of the parties principally interested in the disposition by the will is the heiress-at-law ; and those who prepared the instrument were desirous * 23 that if she disputed it she should do so at the * hazard, if the will were established, of losing all benefit under it. The result of this is that the heiress-at-law, without any knowledge of the circumstances attending the execution of the will, is prevented from raising any question regarding it. A bill is then filed by the devisees in trust against the heiress-at-law and the trustees of her marriage settlement seeking to establish the will, the heiress-at-law having, on her marriage, joined with her husband in assigning her expectant interest as heiress-at-law.

Under these circumstances, the Vice-Chancellor found the heiress-at-law so situated as to be unable to say a word against the will without incurring the penalty which the condition contained in the will attempted to impose on her, the opinion of the Court of Exchequer having for another and collateral purpose, but fortunately, as I think, for the disposal of the cause, been taken as to the legality of that condition, and that Court having certified, upon the case submitted to them, that it was a legal condition. It is true that the case stated the will as a valid will, and of necessity it was so stated, because the question could not arise if there was no will ; but that does not affect the question here, which is, whether the will is valid or not. The Court of Exchequer having, however, held that the condition is legal, and consequently that a forfeiture would be incurred by breaking it, it becomes the duty of this Court

2 Gray, 524 ; 1 Jarman Wills (3d Eng. ed.), 31 ; (4th Am. ed.) 67-74, and notes, 81 ; *Re Watts*, 1 Curt. 594 ; *Creagh v. Blood*, 1 J. & Lat. 509 ; *Snook v. Watts*, 11 Beav. 105 ; *Bannatyne v. Bannatyne*, 16 Jur. 864 ; *Jenckes v. Probate Court*, 2 R. I. 255 ; *Clark v. Fisher*, 1 Paige, 171, 174 ; *Jackson v. Vandusen*, 5 John. 144, 159 ; *Boyd v. Eby*, 8 Watts, 66 ; *Griffin v. Griffin*, R. M. Charlt. 217 ; *Halley v. Webster*, 21 Maine, 461 ; *Whitenach v. Stryker*, 1 Green Ch. 8 ; *Goble v. Grant*, 2 Green Ch. 629 ; *Duffield v. Robeson*, 2 Haring. 375 ; *Harden v. Hays*, 9 Barr, 151 ; *Brock v. Luckett*, 4 Howard (Miss.), 459 ; *Hix v. Whittemore*, 4 Met. 545 ; *Gombault v. The Public Administrator*, 4 Bradf. 226 ; *Saxon v. Whitaker*, 30 Ala. 237 ; *Trumbull v. Gibbons*, 2 Zab. 117.

to be very careful not to expose a party to the chance of this forfeiture ; but, at the same time, to see that it is not made auxiliary to what would be a very gross fraud, if the will was not the will of the testator.

The plaintiffs who file the bill are interested under the will, and come and ask the Court to establish it ; * they make * 24 defendants to that bill the heiress-at-law and the trustees of the settlement, who, having themselves no beneficial interest in the matter, were bound to protect such interest as was conveyed to them by the settlement. The heiress-at-law remains perfectly passive, having, in fact, according to the opinion of the Court of Law, no choice or option in the matter. The plaintiffs, under these circumstances, are bound to make out their case. If, indeed, the heiress-at-law had been a single woman, or had been in a situation to admit the validity of the will, and had thought proper so to do, all difficulty would have been removed ; for the Court would not, in the ordinary exercise of its jurisdiction, call for proof of that with respect to which there was no dispute, all parties interested concurring as to the facts on which the Court was to proceed. The cases, therefore, which have been referred to, in which the Court establishes the will, or declines to send an issue where there is nobody present but the heir-at-law, have no application to the present case, because in those cases there was nothing to try.

The Court does not direct an issue merely because it may itself find some ground of suspicion as to the validity of the will, but because the party alone interested, and against whom the will is to operate, does not admit it to be a good will ; and therefore what, under those circumstances, the Court might have thought proper to do in the present case, if there had been nobody interested against the will but the heiress-at-law, it is not necessary to consider. There are here, however, other parties besides the heiress-at-law who are interested ; and it is right that a fact, apparently of so doubtful a character as that involved in the present case, should be investigated. Even if there were an intestacy, the heiress-at-law would not represent the * interest in the land, for she * 25 has parted with it to a certain extent. If she had parted with it altogether, and so, though heiress-at-law, had ceased to occupy the position of heiress-at-law by having invested others with her rights, she could not by her admissions affect those parties on whom she had conferred her right. She has, in fact, conferred her

right on others, and has, by her marriage settlement, endeavoured (I do not say she has done it effectually) to transfer to others that which belonged to her. It is said, however, that this transaction is void; that she was an infant when she married, and that an infant cannot bind her interest in real property, though it is in consideration of marriage, and the marriage follows. Now this answer to the title, which the bill admits to the extent at least of making those who claim under the marriage settlement parties to the suit, is set up by the plaintiffs; but the plaintiffs have no right to be heard at all till they have shown that they are what they represent themselves to be, namely, parties claiming an interest under the will; and this they cannot do while the will remains in doubt.

The point then to be decided is, have or have not the plaintiffs shown their title; and this raises the question of the validity of the will. If there is no will binding the property, the plaintiffs have no right to come here; and until they have established their own case, they cannot challenge the right of a defendant to be heard. Now, who is there in the present case to question the right of the plaintiffs? The heiress-at-law cannot on account of the forfeiture; but there are other parties in the cause who can, because there are those who stand on her title, fortunately not exposed to the consequences of the forfeiture, whose duty it is,

before they are put to show what right they have to the
 * 26 property under the marriage articles, to resist every * thing
 which may impeach that title which, as trustees, they have undertaken to protect. It therefore appears to me, whatever invalidity there may ultimately prove to be in the title of those who claim under the settlement on the ground of the infancy of the wife at the time of the marriage, that is a question which cannot be raised till the plaintiffs have shown their title under the will.

Now the proof of the title of a party claiming under a will of real estate is simply by the issue *devisavit vel non*; and the sole question here is, whether the defendant who raises the question is a competent party to ask the Court to try it. There is no doubt about it. If the plaintiffs have a right to be considered as trustees under the will without any proof, then the trustees of the settlement would be deprived of whatever right they might have; and the effect would be the same if their title, instead of being open to dispute, had been perfectly free from all doubt. It does not then

appear to me that there is really any question, but that the trustee has a right to call on the plaintiffs to prove their title, and that the only way in which a title of this sort can be proved is by the issue which the Vice-Chancellor has directed.

Then comes the present appellant, being the party entitled to the first estate of inheritance under the will (the plaintiffs not disputing, at least as appellants, the propriety of the course pursued), and says: "You are now going to raise a question about the will, and the testator, or at least the person who is supposed to be testator, has done all he can" (or rather it has been done by the instrument to which his name is appended) "to prevent any question being raised by the will, and you are impeaching the testator's intention." I do not now say what might be the result if there was no other interest on the record, but there being a defendant on * the record whose interest the plaintiffs cannot * 27 dispute, the plaintiffs are bound to prove their title as against such defendant. It is said, however, that their title is proved in the cause. Now a matter of this sort is never thus proved; and if the privilege of asking an issue were confined to the heir-at-law alone, it would often be difficult to establish a will, because when an heir-at-law parts with his interest, he parts with all benefit under that interest. That question, however, does not arise here, because, even if this Court were to look at the evidence, as it would on any other matter of fact arising between plaintiff and defendant, this is a case, above all others, in which the Court would require the assistance of a jury, to be sure that it came to the right conclusion as to the fact. It is therefore quite immaterial to consider whether the defendant is or is not armed with the authority of the heir-at-law in demanding an issue, because, if he were not, the Court would still be doing a very rash thing in acting on the evidence given in this case, where the party principally interested in disputing the will is precluded, by the insertion of the condition, from meeting the evidence produced in support of it.

Whatever, therefore, may be the right of the parties to demand an issue, this is a case in which, as a matter of discretion, the Court would think it necessary to adopt that course. Now this is what the Vice-Chancellor has done. The heiress-at-law being disarmed, and there being another party entitled to call on the plaintiffs to prove their case, the question arose in what manner that

proof was to be had. That, according to the ordinary course of the Court on a matter of suspicion and doubt, would be not on the depositions taken in equity, but upon the result of an inquiry at law by an issue *devisavit vel non*. I think, therefore, that * 28 the Vice-Chancellor's decree was entirely right, and I should have been very sorry indeed if means had not existed by which, under the circumstances as they appear here, an opportunity could be afforded to the Court of ascertaining beyond all question what the real history of this, as it appears to me, most mysterious and suspicious transaction, really is. If there were nothing else, the mere fact of a will being executed by a party under a commission of lunacy would make it difficult for this Court to act upon it without better inquiry than can result from the mode of investigating facts in this Court. It appears to me beyond all question that the Vice-Chancellor's decree is correct, both in substance and in form, and must be affirmed accordingly.

The only point that occurs to me, and it is one with which neither the appellant nor the plaintiffs have any thing to do, is, whether the decree, as it stands, sufficiently protects the heiress-at-law. It does not appear at all upon the order by whom or at whose suggestion this issue is directed. The heiress-at-law is in that difficult position, that if she had demanded the issue, that is to say, if she in the terms of the will had done any thing to impede the execution of the will, a question might arise how far she had or not incurred the penalty, and the Court is anxious to protect her as far as possible against any such question being raised. She is perfectly safe, as far as appears at present, but it is very desirable to preserve her in future proceedings from being exposed to such a question. It appears to me that the decree would be safer if it had stated that she had not demanded the issue, or that it was demanded on behalf of the trustees under the settlement.

Mr. Bethell.—The view that the trustees of the settlement * 29 took of their position was this, that they were assignees of the beneficial interest that the husband might have *virtute mariti*, and were therefore not acting on behalf of the heiress-at-law. The matter was brought under the notice of the Vice-Chancellor by the counsel for the heiress-at-law and her husband, who asked, on the authority of *Sterling v. Livingston*, (a) that the

(a) 2 Ch. 39.

direction for the issue might be guarded so as to protect the heiress-at-law from the clause of forfeiture in the will; but the view which his Honor took of the case was, that directing the issue was the act of the Court.

THE LORD CHANCELLOR. — It is upon the fact of the trustee of the settlement disputing the validity of the will that the Court directs the issue, and that is free from all question under the forfeiture; but I think it much safer to introduce into the decree some words stating this fact as a guard. The Vice-Chancellor thought, as is very true, that it is safe enough without it; but I think it safer with it. What I desire is to exclude the inference that the heiress-at-law disputes the will.

NOTE. — The order in *Sterling v. Livingston*, referred to by *Mr. Bethell*, in which, however, it will be seen that the plaintiffs were the party liable to the forfeiture, is in the following terms: "His Lordship doth think fit, and so orders and declares, that such action or actions so to be brought or prosecuted by the plaintiffs, or either of them, or any prosecution or proceeding thereupon, shall not in any sort be construed or taken to be any breach or forfeiture of the said proviso, nor shall any advantage or benefit be in any way taken thereby or by reason thereof against the plaintiffs or either of them."

* DUNCAN v. LUNTLEY.

* 30

1849. November 30. December 3.

The shares of a proprietor in a joint-stock company were sold out without his authority, and not in conformity with the provisions of the deed by which the company was constituted. On a bill filed by the shareholder, alleging that the sale was the fraudulent act of the secretary of the company, and sanctioned by the directors; but, assuming the transaction to be valid as against the transferee, and praying that the loss might be made good out of the assets of the company: demurrer for want of equity allowed, on the ground that the bill stated no case for making the company liable in damages.

Held, also, that the transferee of the shares was not a necessary party to the suit.

THE bill in this case, which was filed in December, 1848, against the chairman and secretary of the Abney Park Cemetery Company, after stating the formation of the company by deed in 1839, with a

capital of 35,000*l.* in 3500 shares of 10*l.* each, and that by the 8th clause of this deed it was provided, that the chairman of the board of directors and the secretary for the time being should be the two officers to sue and be sued on behalf of the company, set out the following among other clauses of the deed of settlement.

Clause 111. "That whenever such notice as hereinafter is mentioned by any holder being the husband of a female proprietor, or any executor or administrator of a deceased proprietor, desirous of becoming or having procured some person or persons to become a proprietor or proprietors, in respect of all or any of the shares held by him or her in the company in any of those capacities, or by any holder or holders being an assignee or assignees of a bankrupt or insolvent proprietor having procured some person or persons to become a proprietor or proprietors in respect of all or any of the shares held by him, her, or them in the company in that capacity, or by any holder being a proprietor having procured some person or persons

to become a proprietor or proprietors in respect of all or any
 * 31 of the shares held by him or her in the company, * shall have
 been left at the principal place of business for the time being
 of the company, the board of directors shall proceed without delay
 to take such notice into consideration, and shall under the hands of
 three of the directors certify in writing to the holder or holders
 giving the notice the approbation or disapprobation by the board of
 directors of the proposed proprietor or proprietors, and shall, if
 the person or persons proposed in such notice shall be approved of,
 in the case of a holder or holders desirous of becoming a proprie-
 tor or proprietors, forthwith on such application being certified as
 aforesaid, or in case of any holder or holders having procured some
 person or persons to become a proprietor or proprietors, forthwith
 on the deed or deeds by which the share or shares of such holder
 or holders shall have been transferred being left at the principal
 place of business for the time being of the company, cause, either
 at the expense of such proprietor or proprietors, or at the expense
 of the company, at the option of the board, his, her, or their name
 or names to be entered in the share register book as the proprietor
 or proprietors of such share or shares, and shall at the same time,
 either at the expense of such holder or holders, or at the expense
 of the company, at the option of the board, cause such entry, eras-
 ure, or other alteration, to be made in the share register book, as
 the board shall think fit, for the purpose of making it appear that

the last proprietor of such share or shares, and all persons claiming under him or her, except the person or persons procured to be a proprietor or proprietors in respect of such share or shares, is or are no longer entitled thereto ; and after such entry, erasure, or other alteration as aforesaid shall have been made in the share register book, the board of directors shall at any time, if requested by such holder, or by any one or more of such holders, and at * his, her, or their expense, or at the expense of the company, * 82 at the option of the board, deliver, or cause to be delivered, to the holder or holders making such request a certificate in writing of such entry, erasure, or other alteration ; and such certificate shall be in such form as the board of directors shall think fit."

Clause 113. "That in no case shall the board of directors permit more than one person to become a proprietor of the company, in respect of any share or shares in the company, it being thereby intended that there shall be no fractions of shares ; and that two or more persons jointly entitled to any share or shares shall not be allowed to be joint proprietors of the company in respect thereof."

Clause 165. "That whenever any holder or holders of any share or shares in the company shall have procured some other person or persons to become a proprietor or proprietors in respect of all or any of the shares held by him, her, or them in the company, he, she, or they shall give notice thereof in writing at the principal place of business for the time being of the company, and shall describe in such notice the name and residence of the proposed proprietor, or of each of the proposed proprietors, and the distinguishing number or numbers of the share or shares in respect of which he, she, or they shall have procured such person or persons to become a proprietor or proprietors."

Clause 171. "That when and so often as any person, not a purchaser from the board of directors, shall have been approved by the board as a fit person to become a proprietor of any share or shares in the company, and such entry, erasure, or other alteration in respect of such share or shares shall have been made * by the * 33 board in the share register book as hereinbefore required, the last proprietor of such share or shares and all persons claiming by, from, or under him or her, other than the person so approved as a proprietor, shall from the time when such entry, erasure, or other alteration shall have been made, have no claim or demand whatsoever either at law or in equity upon or against the company or

any of the proprietors thereof for the time being, other than the person so approved as a proprietor, his or her executors or administrators, for or on account of or in anywise relating to such share or shares, except in respect of the dividends or other profits which may have been declared previously to the time when such entry, erasure, or other alteration shall have been made, and on payment of any further instalment or instalments which may then have been previously called for on such share or shares, be for ever acquitted and discharged from all further liabilities and obligations in respect of such share or shares, and from all further claims and demands on account of the same, and the certificate of such entry, erasure, or alteration to be given by the board of directors as hereinbefore required shall at all times be evidence of such acquittance and discharge in respect of such share or shares."

Clause 174. "That every entry, erasure, or other alteration, which upon the subscription for, or the purchase or acquisition of, any share or shares in the company shall have been made by the board of directors in the share register book shall, as between the company and the last proprietor of such share or shares and all persons claiming by, from, or under him or her, be binding and conclusive upon such last proprietor and all persons claiming by, from, or under him or her, and he, she, or they shall not be at liberty to

* 34 dispute or * call in question the validity of such entry, erasure, or other alteration, or for the purpose of disputing or calling in question the validity of such entry, erasure, or other alteration, to inquire whether all the rules and regulations hereby required to be observed and attended to previously to the making of such entry, erasure, or other alteration had been duly observed and attended to or not, but the last proprietor of such share or shares or any person or persons claiming by, from, or under him or her may maintain any action or suit to which he, she, or they may be entitled, against any person or persons for any act, neglect, or default through or by reason of which such entry, erasure, or other alteration may have been improperly made: provided, nevertheless, that no action or suit shall be commenced against any director or other officer of the company for any such act, neglect, or default after the expiration of one year from the time when such entry, erasure, or other alteration shall have been made."

Clause 175. "That previously to the entry in the share register book of the name of any person as a new proprietor of any share

or shares in the company, it shall not be necessary for the board of directors to inquire whether such share or shares have or hath been effectually vested in such person or not, it being the true intent and meaning of these presents, that if the name of any person shall have been improperly entered in the share register book as a proprietor of any share or shares, such person shall, as between him or her and the other proprietors for the time being of the company, be a proprietor of the company to all purposes in respect of such share or shares, and all claims which the last proprietor of such share or shares, or any person or persons claiming by, from, or under him or her may have in the same, shall be made wholly and * exclusively upon and against the new proprietor of such * 35 share or shares or his or her executors or administrators."

Clause 176. "That the share register book shall, as between the company and every person claiming to be a proprietor of the company in respect of any share or shares in the company, be conclusive evidence on behalf of the company that he or she is a proprietor of the company in respect of such share or shares. And in the case of every purchaser of a share or shares in the company, the entry of his or her name in the share register book shall be conclusive evidence both at law and in equity of his or her right and title to the share or shares which he or she shall have purchased."

Clause 178. "That every certificate, indorsement, or memorandum to be made and delivered by or by direction of the board of directors to every present and future proprietor of a share or shares in the company for denoting the proprietorship of such share or shares, shall as between the company and such proprietor be conclusive evidence on the behalf of such proprietor that he or she is a proprietor of the company in respect of the share or shares to which such certificate, indorsement, or memorandum may relate, and such certificate, indorsement, or memorandum shall continue to be such conclusive evidence until such entry, erasure, or other alteration as hereinbefore mentioned shall have been made by the board of directors in the share register book for the purpose of making it appear therein that the proprietor of the share or shares mentioned in such certificate, indorsement, or memorandum is no longer entitled to such share or shares."

* The bill then stated that William Clowes, the plaintiffs' * 36 testator, was at the date of his death the duly registered

proprietor of one hundred shares in the company ; that he died in January, 1847, having appointed the plaintiffs James Duncan, David Nash, William Clowes, and George Clowes his executors, who duly proved his will ; that, in consequence of the provisions of the 113th clause of the deed of settlement requiring shares to be in the name of one proprietor only, and the legal title to the one hundred shares being vested in the plaintiffs as executors, the plaintiff W. Clowes, with the sanction of the other plaintiffs, in July, 1847, brought the certificates for the one hundred shares to the office of the company, for the purpose of having the one hundred shares transferred to and duly registered in his name ; that he then in the transfer book of the company (in which in ruled columns were stated the following particulars, viz., "name of the shareholder, number of his or her share or shares, transfer by whom ordered, to whom made") signed in his own name, but on behalf of himself and the other plaintiffs as executors of the testator, in the column containing the words "by whom ordered," the transfer of the one hundred shares as having been ordered by the executors of the testator, and also signed in his own name, in the column containing the words "to whom made," the transfer thereof to himself, and then left the certificates with John Conquest, the secretary of the company, to be registered.

The bill then stated that, on the 18th April, 1848, the plaintiff W. Clowes verbally authorized J. Conquest to sell the one hundred shares at the price of 9*l.* per share ; that on the 25th May, 1848, the plaintiff W. Clowes attended at the office of the company by their desire, and was informed by them that J. Conquest had

* 37 absconded to America, having sold fifty of the one * hundred shares to one John Dyer at 9*l.* 7*s.* 6*d.* per share, and that J. Conquest had received the purchase-money for the fifty shares from J. Dyer, and had fraudulently applied the same to his own use, but that he had left the remaining fifty shares in his desk, which fifty shares were; by the direction of the company, then returned to the plaintiff W. Clowes ; that in the transfer order book, the order of transfer from the plaintiff W. Clowes to J. Dyer in the column "by whom ordered," was not signed by any one, but in the column "to whom made," J. Dyer had affixed his signature ; that it further appeared from the books of the company, that at a meeting of the board of directors on the 4th October, 1847, a minute was made of that date in the directors'

book, approving of a transfer of the fifty shares to J. Dyer, and that the same shares then stood entered in the share register book of the company as the property of J. Dyer, such entry, erasure, or other alteration as required by the deed of settlement having been made in the share register book of the company by the board of directors in respect of such fifty shares, upon their approval of J. Dyer as a fit person to become the proprietor thereof, in the month of October, 1847, or shortly afterwards; that the board of directors of the company approved of the transfer of the fifty shares to J. Dyer, and caused the minute of the 4th October, 1847, to be entered into their book, without ever having received any notice in writing or otherwise from the plaintiff W. Clowes of his desire to sell such shares, although, by the 165th clause of the deed of settlement, it was expressly provided that notice in writing should be given to the company by the proprietor selling of his desire to sell; that after the board had caused J. Dyer to be registered in the share register book of the company as the proprietor of the fifty shares in the place of the plaintiff W. Clowes, they did not at any * time give to the plaintiff W. Clowes a * 38 certificate of such entry, erasure, or other alteration as by the settlement deed they were required to do and ought to have done, and which if they had done the fraud committed by their secretary and agent would have been at once discovered, notwithstanding the payment of every instalment, which at the date of such entry, erasure, or other alteration had been previously called for on such fifty shares, had been made; that the plaintiffs were totally ignorant of the sale of the shares to J. Dyer until the discovery of the fraud by the company, and that the plaintiffs never in any way authorized the sale thereof to J. Dyer, and that such sale was a fraud upon the estate of the plaintiffs' testator, arising solely from the neglect or default of the directors of the company and the fraud of their secretary and agent; and that the loss which the testator's estate had sustained by such fraudulent sale ought to be made good out of the estate and assets of the company.

The bill then prayed, that the estate and assets of the company might be declared liable to make good to the estate of the plaintiffs' testator the loss which the testator's estate had sustained by the fraudulent sale of the fifty shares, and that the company might be decreed to make good the same accordingly out of the estate and assets of the company, and to pay the costs of the suit.

To this bill the company demurred, for want of equity and for want of parties, alleging that J. Dyer and J. Conquest, and all the directors and shareholders of the company, ought to have been made parties. The Vice-Chancellor KNIGHT BRUCE having allowed the demurrer generally, with liberty for the plaintiffs to amend, the plaintiffs now appealed to the Lord Chancellor.

* 39 * *Mr. Bacon* and *Mr. W. A. Collins*, for the plaintiffs.

The company are the trustees of the plaintiffs, who have a right under the circumstances to elect either to have the specific shares retransferred into their names, or to have the value of the shares. *Harrison v. Pryse*. (a) In the present case a retransfer is not prayed, and, therefore, the transferee of the shares (J. Dyer) is clearly not a necessary party; but if the bill had prayed a retransfer, and if J. Dyer were a party, still the company would be responsible. *Ashby v. Blackwell* (b). overruling *Hildyard v. South Sea Company*. (c) The plaintiffs are not seeking to ratify the unauthorized act of the secretary, and do not make that act the ground of their demand. *Stone v. Marsh*. (d) [They also referred to *Sloman v. The Bank of England*, (e) and *Davis v. The Bank of England*. (g)]

Mr. J. Russell and *Mr. Miller*, in support of the demurrer. — It is material to consider whose agent the secretary was: he cannot be considered as the agent of the company for the purpose of buying and selling shares, and the transaction was not within the scope of his authority. *Vandaleur v. Blaggrave*. (h) In the present case the gross negligence of the plaintiffs enabled the secretary to commit the fraud complained of, and they are, therefore, not entitled as against the company to recover. *Coles v. The Bank of England*. (i) By the 171st clause of the deed of settlement the claim of a party whose shares have been wrongfully transferred is limited to the transferee.

* 40 [* THE LORD CHANCELLOR. — The liability of the new purchaser would not exclude any claim the party might have as against the company.]

(a) Barnard. 324.

(b) 2 Eden, 299; S. C., Amb. 503.

(c) 2 P. W. 76.

(d) 6 B. & C. 551.

(e) 14 Sim. 475.

(g) 2 Bing. 393.

(h) 6 Beav. 565.

(i) 10 A. & E. 437.

If the plaintiffs have any remedy it must be by action at law against such of the directors as were in fault. The plaintiffs have a clear remedy against J. Dyer, for there can be no doubt that the shares were not effectually transferred, and his absence from the record is, therefore, much more than a mere want of parties. Assuming, however, that a bill in equity is maintainable, it is clear that the clause authorizing the institution of suits by the chairman and secretary would not apply to this case, where the directors, if liable at all, would be individually liable, nor dispense with the necessity of having them parties. *Seddon v. Connell.* (a)

Mr. Bacon, in reply. — The 176th clause of the deed of settlement prevents any question being raised as to the title of J. Dyer to the shares transferred to him, and the only remedy of the plaintiffs is in equity.

December 3.

THE LORD CHANCELLOR. — This bill prays, in very unusual language, as against the company in which the plaintiffs and the other shareholders are partners, “that, under the circumstances mentioned in the bill, the estate and assets of the company may be declared liable to make good to the estate of the plaintiffs’ testator the loss which the testator’s estate has sustained by the fraudulent sale of the fifty shares in the company to John Dyer as in the * bill mentioned, and that the company may *41 be decreed to make good the same accordingly out of the estate and assets of the company, and for that purpose that all proper and necessary directions may be given.” Now this is in effect a prayer for compensation in damages for a loss or supposed loss which has been sustained through the fault of the company; for the bill seeks to make the company and not any officer of the company liable, and that the loss may be made good, not by considering the shares still remaining as the property of the plaintiffs, but assuming that having been the property of the plaintiffs they have been validly transferred to another person. The bill for that purpose sets out various clauses in the deed of settlement, by which the interests of the partners were as between themselves regulated; and of these clauses one of the most important is the 174th, which,

after detailing the mode in which the transfer of shares should be made, provides, &c. (His Lordship here read the clause.)

Now that clause gives validity, or is supposed to give validity, to transactions provided they are done under the circumstances specified by the deed. The deed provides certain forms by which the transfer of shares may be made, and amongst others, is one which has not been observed in the present case (and which omission probably gave rise to the loss which has been sustained),—namely, that there should be a document containing in one column the name of the transferor of the share, and in the other column that of the proposed transferee. It is obvious that if that had been attended to, the transferee would have seen who the transferor was, and at all events, on the face of it, it would have appeared to be a regular transaction. In this case, however, that was * 42 entirely omitted, and * this omission must, or at least might, have come to the knowledge of the transferee, because he signed the book containing the form in question. If he had taken the trouble of informing himself of the provisions of the deed, he must, by looking at the column which was under his eye, have seen that there was an irregularity in the transaction, the name of the transferor not appearing. Thus much must be assumed to be proved against the party taking the benefit of the transfer. There were besides various other provisions in the deed, which, being introduced for the purpose of preventing any fraudulent or improper transfer of shares; it was the clear duty of the officers of the company to see carried into effect. Many of them, however, were not acted on, and the result was, that the secretary of the company got the transfer now in question made by the directors, who, without seeing whether the forms had been properly adhered to or not, and placing implicit faith in the secretary, signed any paper that was put before them. If they had taken the trouble to do what the deed made it their duty to do, and had seen that the documents authorizing the party to make the transfer were correct, this fraud could not have been practised. The fraud was practised, however, and the result was, that Mr. Dyer became the apparent transferee of the plaintiffs' shares.

Now there are two questions which may arise, first, whether the remedy does or does not exist as against this transferee; and, secondly, whether the directors of the company, who were the immediate instruments of the fraud, though not consciously or

knowingly so, are the persons liable. The present question, however, is, whether on this bill it appears that the company are liable for the shares in the form in which the bill seeks to make them liable. The bill of course assumes * that there is no * 43 remedy against the transferee of the shares, and that he has a clear title to them: it assumes, also, that there is no remedy against the directors of the company, and that, therefore, the only remedy is against the company itself.

The case made by the bill is, that the forms of transfer prescribed by the deed were not observed. Whether such a transaction is one which would bind the company, as being the act though unauthorized of its officers having power only to bind the company if they adopted a certain course of proceeding, is a matter which may be for the consideration of the plaintiffs: but the plaintiffs in the present case do not ask to have the shares restored, but only for damages. Now a claim for damages implies a wrongful act; but the company have done nothing: the officers have, according to the statements in the bill, misconducted themselves by doing that which they were not authorized to do, but it is clear that this cannot entail liability on the company. It is impossible, then, to maintain this bill on the general equity, and I cannot, on the case as stated in the bill, come to the conclusion that the company are bound by the act complained of. But supposing the case to be made out, and that it was shown that the property was lost by the negligence of the company, the company being the actors, what would be the effect of this according to the cases cited? In the case referred to of *Ashby v. Blackwell*, (a) the company were considered liable, they and not their officers being the parties whose duty it was to make the transfer.

Now I have looked through the bill in the present case to see whether there is a statement that the act * complained * 44 of was that of the company; but it is distinctly stated not to be the act of the company, but to be the unauthorized act of the agent of the company. Now the moment it is said to be an unauthorized act, the authority of *Ashby v. Blackwell* (a) must be admitted to prevail. What then was the remedy sought in that case? The company having there done an unauthorized act, the Court treated it as not done, and restored the party to the prop-

(a) 2 Eden, 299; S. C., Amb. 503.

erty of which he had for the time been improperly deprived. That, however, is not the object of the present bill, which assumes the transaction to be valid, and asks that the company may pay compensation in damages. No case has been cited in which that has been done or attempted to be done ; and, without at all saying that the plaintiffs are without remedy or means by which they may be restored to the property which has been fraudulently taken from them, I am clearly of opinion that this bill does not state such a case, and therefore that, on the general equity, the demurrer is good.

I need not take any notice of the other question as to the want of parties, because in the view just stated it becomes immaterial ; but I cannot help observing that, according to the cases cited, Mr. Dyer is not in the situation of being a necessary party. If the bill had questioned his interest in the purchase, he would be a necessary party ; but, according to the bill, the equity, if there be any, is against the company for damages on the ground of Mr. Dyer being entitled.

Now the order of the Vice-Chancellor gives leave to amend,
 * 45 which is not very usual where the demurrer is * allowed for want of equity ; but the plaintiffs have obtained a benefit by the order which I do not feel disposed to take from them, particularly when I see the possibility of the case being so altered by amendment, as to raise a grave question whether the plaintiffs may not be entitled to some relief. The order, therefore, of the Vice-Chancellor will be affirmed with costs.

ELMHIRST v. SPENCER.

1849. December 5, 6.

A Court of Equity will not exercise its jurisdiction by injunction at the instance of an individual against an alleged nuisance, without a previous trial at law, or without its being clearly proved that the plaintiff has sustained such substantial injury as would have entitled him to a verdict for damages in an action at law.¹

The defendant diverted a stream as it passed through his premises, but restored

¹ See *post*, p. 51, note ; 2 Dan. Ch. Pr. (4th Am. ed.) 1689 note (4).

it undiminished as to the quantity of water to its former channel before it reached the premises of the plaintiff: the defendant also employed the stream, while on his premises, in a way which rendered the water unfit for ordinary use, but he alleged that the water, by the time it reached the plaintiff's lands, was freed to the utmost possible extent from any noxious ingredients with which it had become impregnated; and it did not appear that any actual damage was sustained by the plaintiff. Under these circumstances, the Lord Chancellor dissolved an injunction, which had been granted by the Vice-Chancellor, restraining the defendant from diverting and using the water.¹

THIS was a motion by special leave, on the part of the defendants, to discharge an order of the Vice-Chancellor of England, made on the 4th December, 1849, whereby the defendants were restrained from interrupting or disturbing the plaintiff in the free use of certain streams or watercourses flowing through the plaintiff's lands, and from fouling such waters,² and from continuing to divert, turn, or change the channels, beds, or courses, of the said streams or watercourses from their ancient channels respectively, and from casting into the same streams or any of them any foul or * impure water, dirt, filth, or any other noxious or con- * 46
taminating matters whereby to foul or render unfit for their ordinary use the waters of the said streams, and from otherwise damaging or injuring the plaintiff in the rightful enjoyment of the flow and use of the said streams into, through, over, along, and across the plaintiff's land.

From the statements in the bill, which was filed on the 10th October, 1849, it appeared, — that from time immemorial certain brooks or watercourses had flowed through the plaintiff's lands, two of which were derived from and passed through the lands occupied by the defendants; that the plaintiff's lands were used for agricultural purposes; that in 1848 the defendants had erected certain bleaching works on their premises, which adjoined the plaintiff's lands; and that the defendants, in the prosecution of this business, used and employed, and at the date of the bill were using and employing, certain deleterious and poisonous and noxious chemical, and other matters, and had diverted the beds or channels of the streams within their own premises.

The bill alleged that, previous to such pollutions and diversions, the said streams or watercourses were fit for the purposes of

¹ See *Goldsmid v. The Tunbridge Wells Imp. Comm.* L. R. 1 Ch. Ap. 349, 355; 2 Dan. Ch. Fr. (4th Am. ed.) 1639 and cases in note (2).

² See 2 Dan. Ch. Fr. (4th Am. ed.) 1638, and note (3) and cases cited.

irrigation, and for culinary purposes, and for cattle, and were productive of fish; but that since such pollution and diversion the defendants had not only checked and cut off the usual flow of water from the plaintiff, but had rendered the reduced supply unwholesome and unfit for the use of man or beast, and destructive of the fish, to the plaintiff's great and irreparable injury. The bill prayed in the terms of the injunction before stated.

* 47 * By their answer the defendants stated, that they had in the prosecution of the said business used and employed, and that they still used and employed, some deleterious, poisonous, and noxious chemical, and other matters, and that the elements or chemical substances used by the defendants in the various processes of bleaching or contained in the refuse left thereby, were soda, carbonic acid, lime, sulphuric acid, chlorine, and vegetable matter; that such elements were contained in various degrees in the matters used by the defendants in the process of bleaching, but that the poisonous and deleterious qualities of such elements were in the said process extracted to the utmost possible extent; that occasionally the waters of the said stream were rendered very foul and corrupt by pumping out the sumph holes of certain collieries, and by the existence of a fellmonger's yard, and by the sewerage of a village, all higher up the stream. The defendants then admitted the diversion of the stream within their own premises, but contended that such diversion did not in any way affect the quantity of water supplied to the plaintiff's lands. They then stated that, notwithstanding the use as therein mentioned of certain deleterious and poisonous chemical elements in the process of bleaching, all the deleterious, noxious, and poisonous qualities thereof were to the utmost possible extent eradicated, neutralized, used, and absorbed in such bleaching process; that in order to render it impossible that the said streams or either of them should be in any way prejudicially affected by the said bleaching operations, the water employed for bleaching purposes was made to pass through several filters before the same was returned to the brook, so that at the time the water was so returned the same was almost entirely free from any impregnation whatever of the ingredients employed in bleaching, and * was, although sometimes to a very trifling degree discoloured, perfectly innocuous and fit for the drink of animals and unprejudicial to the lives of fish; that the water was, when it reached the lands of the plaintiff, in all respects

as pure and wholesome and capable of being applied to culinary or any other purposes as before the erection of the said bleaching works, and was as pure and wholesome as if the same had not been at all employed by the defendants in the said bleaching purposes. They denied that the bleaching works tended or would tend to the injury or nuisance of the plaintiff or his property.

There was no precise evidence of the time when the bleaching operations of the defendants commenced, except that it appeared by the bill that it was some time in 1848.

Mr. Stuart and Mr. T. H. Terrell, for the defendants, in support of the motion. — The Vice-Chancellor has construed this answer as admitting the acts complained of to be a nuisance, and therefore the plaintiff's title to the injunction, but the answer is in this respect only a qualified admission, for although it admits the diversion of the streams, yet it states that such diversion has taken place in the defendants' own premises, and that the streams are restored to their ancient channels before they reach the plaintiff's lands; and again, although it admits the use of deleterious matters for the purposes of bleaching, yet it states that by filtration the noxious qualities of the substances used are to the utmost possible extent extracted. This is at most only a private injury, the amount of damage from which is a question for a jury to determine. It is clearly not a nuisance warranting the interference of this Court by *injunction. *The Attorney-General v. Cleaver*. (a) Lord REDESDALE lays it down, (b) that "in the case of a private nuisance it seems necessary that a judgment at law ascertaining the rights of the parties should have previously been obtained" before a Court of Equity will interfere. These works have been in operation for more than a year, so that there was ample time to have brought an action. [They also referred to *Spottiswoode v. Clarke*. (c)]

Mr. Bethell, Mr. Rolt, and Mr. Rogers, contra. — The answer does not question the plaintiff's title: there is therefore nothing to be tried by a jury. It is not so much a case of nuisance as of irreparable waste, and the admissions in the answer on which we rely are quite sufficient to sustain this injunction. It is no answer

(a) 18 Ves. 211.

(b) Mit. Pl. p. 144, ed. 4.

(c) 2 Phillim. 154.

to such a case as the bill makes, to be told that the poisonous matter admitted to be used is "extracted to the utmost possible extent." (They referred to *Wood v. Waud* (a) as to the rights of a riparian proprietor to a natural stream.)

Without calling for a reply,

THE LORD CHANCELLOR, after remarking that there was no evidence of there being any house on the plaintiff's lands, so that nothing prejudicial to culinary purposes was to be apprehended, observed that the injunction not only interfered with what was alleged to be a nuisance, but also with the diversion of the streams in the defendants' own lands. His Lordship then proceeded to the following effect:—

* 50 * The diversion complained of is a grievance unconnected with the pollution of the water, and the stream being restored to its old channel before it enters on the plaintiff's lands, the diversion cannot interfere with any right that the plaintiff may have to the water. How far then is there a case made out for the interposition of the Court? The Vice-Chancellor has proceeded on admissions in the defendants' answer, which is not perhaps as guarded as it might have been. The bill alleges a right to certain water in as pure a state as it was accustomed to flow before these bleaching works were erected; and the answer admits this right, subject to certain qualifications annexed to the admission. The Vice-Chancellor has however construed this into an unqualified admission that the plaintiff is entitled to the use of the water in the manner alleged by the bill.

Now the plaintiff, before he can ask for an injunction, must prove that he has sustained such a substantial injury by the acts of the defendants as would have entitled him to a verdict at law in an action for damages.¹ In the manufacturing districts, where there are as many mills along a stream as the water will supply, it would be extremely hard that a proprietor of one of such mills might not divert the stream within his own land, restoring it to its ancient channel before it entered into the lands of his neigh-

(a) Before the Court of Exchequer, April, 28, 1849. [3 Exch. 748.]

¹ See *Attorney-General v. Cambridge Consumers Gas Co.*, L. R. 4 Ch. Ap. 86. But see *Angell Watercourses* (Perkins's ed.) § 449 and cases in notes; *Per Story J.*, in *Webb v. Portland Manuf. Co.*, 3 Sumner, 189.

bour without a diminution of the usual quantity.¹ In such cases, and in the similar case of alleged obstruction to the use of light,² in order to sustain an injunction, there must be both an unwarrantable use and an injury resulting from such use. In the present instance, however, the defendants' admission is quite consistent with the fact that the plaintiff has sustained no injury; and this Court will not take upon itself to adjudicate upon the question of whether * this is a nuisance or not: that must be * 51 ascertained in a Court of Law, as laid down by Lord ELDON in *The Attorney-General v. Cleaver*. (a)³

Another consideration here is, which side will suffer most, the defendants from the granting of the injunction, or the plaintiff from its being withheld.⁴ The injunction effectually prevents the defendants from working at all, for if they could go on without diverting the stream, they would be subject to a breach of the injunction by employing for their bleaching the chemical process which they have hitherto used, and in the event of their being able to employ other ingredients, they would still be prevented from diverting the stream. With respect to the stream being polluted and poisoned, it is admitted that the plaintiff has no house on these premises, so that there can be no interruption to any culinary operations, as is to be inferred from the statements in the bill. Then it is alleged that the water is not so good for the pur-

(a) 18 Ves. 211.

¹ See *Wood v. Edes*, 2 Allen, 580; *Angell Watercourses* (Perkins's ed.) § 120 *et seq.* and notes.

² See 2 Dan. Ch. Pr. (4th Am. ed.) 1638, and note (2) and cases cited.

³ 2 Dan. Ch. Pr. (4th Am. ed.) 1635, note (1) and cases, 1639, note (4), 1640, 1641 and cases in notes. In all cases in which doubt exists as to the legal right, a Court of Equity will compel the parties to go to trial at law, without delay, either dissolving the injunction or maintaining it until such trial has taken place, as the justice of the case, and the interests to be affected by the determination, appear to require. *Angell Watercourses* (Perkins's ed.), § 452. See *Van Bergen v. Van Bergen*, 3 John. Ch. 282; *Reid v. Gifford*, 6 John. Ch. 19; 1 Hopk. Ch. 416; *Coalter v. Hunter*, 4 Rand. 58; *Binney's Case*, 2 Bland, 99; *Gates v. Blencoe*, 1 Dana, 15; *Coe v. Lake Company*, 37 N. H. 254; *Burnham v. Kempton*, 44 N. H. 78; *Burden v. Stein*, 27 Ala. 104; *Wood v. Sutcliff*, 8 Eng. L. & E. 217; 2 Sim. N. S. 163; *Porter v. Witham*, 17 Maine, 292; *Dana v. Valentine*, 5 Met. 8; *Ingraham v. Dunnell*, 5 Met. 118; *Attorney-General v. Utica Ins. Co.*, 2 John. Ch. 379; *Eastman v. Amoskeag Manuf. Co.*, 47 N. H. 71; *Bassett v. Salisbury Manuf. Co.*, 47 N. H. 426, 437; *Mason v. Sanborn*, 45 N. H. 169.

⁴ See 2 Dan. Ch. Pr. (4th Am. ed.) 1640 and cases in note (3).

poses of irrigation ; but many of the ingredients used by the defendants in their bleaching process are in fact most beneficial to land ; and there is no statement that the water is injurious to cattle, or that the fields are not equally well drained. There can be no doubt then as to the balance of inconvenience. If this injunction stands there will be a total cessation of the defendants' works, which would amount to the greatest injury, and therefore, on this ground alone, I must refer the case to a jury, and have the legal right first ascertained.

The real contest between the parties is, whether the plaintiff's land is injuriously affected by what the defendants have * 52 done. The answer, so far from admitting * such a conclusion, leaves it very doubtful, in my opinion, whether any injury at all has resulted to the plaintiff from the defendants' works. To this consideration must be coupled the admitted fact, that there have been two assizes since the works complained of were commenced where the plaintiff might have established his right ; and where a party cannot show that he is necessarily compelled to come into a Court of Equity, he is not entitled to call on the Court to go out of its usual course on his behalf. For all these reasons, I am of opinion that the injunction must be dissolved.

WHITWORTH v. WHYDDON.¹

1850. January 11.

Although there is no rule of practice that in cases where the will is in contest in the Ecclesiastical Court, the Court of Chancery will not grant a receiver where the property is in the hands of the executor, yet it must be clearly shown that the nature and position of the property is such as to warrant the interference of the Court.

Under what circumstances fresh affidavits may be read on the hearing before the Lord Chancellor of a motion to discharge or vary an order of the Vice-Chancellor.

THIS was a motion to discharge or vary an order of the Vice-Chancellor of England, dismissing with costs the motion of the plaintiffs for the appointment of a receiver of the personal estate

¹ S. C., 14 Jur. 142.

of Eliza Whitworth, deceased, pending litigation in the Prerogative Court; and the motion proceeded to ask that, pending such proceedings, a receiver might be appointed, with liberty for one of the plaintiffs to propose himself to act without salary.

The plaintiffs in the suit were the sole next of kin of Eliza Whitworth, who died on the 16th September, 1849, while on a visit at the house of the defendant Joseph Whyddon. On the 15th September, 1849, she had signed * her will by * 53 means of a mark, and thereby, with the exception of certain property given to her by her father's will which she directed to go as therein directed, she gave all her property whatsoever and wheresoever to Sarah C. Whyddon, the wife of the defendant J. Whyddon; and she appointed J. Whyddon her executor. The bill stated that this will was presented to her for execution at the time when she was labouring under congestion of the brain, and when she was in fact *in extremis*; and that proceedings had been instituted in the Ecclesiastical Court, for the purpose of having the will declared null and void. It also alleged, that at the time of her death the testatrix had in her possession or otherwise in the house of J. Whyddon, cash, watches, jewellery, plate, linen, wearing apparel, and other articles of considerable value; and also divers letters belonging to her, all of which had been taken possession of by J. Whyddon, under colour of his being the executor appointed by her in and by the paper writing purporting to be her last will and testament. These allegations were supported by an affidavit of one of the plaintiffs, which also contained statements as to other outstanding property of the testatrix.

On the 11th December, 1849, the Vice-Chancellor of England dismissed the plaintiffs' motion for a receiver, on the ground that it was not the practice of the Court to grant a receiver where the property was in the hands of the executor named in the will, but only in those cases where the property was outstanding, and likely to be lost for want of collection.

Mr. Malins and *Mr. Schomberg* for the appeal motion. — The Vice-Chancellor's order dismissing the plaintiffs' application cannot be supported. The rule of the Court applicable to a case like the present * is correctly stated by the Vice- * 54 Chancellor WIGRAM in *Rendall v. Rendall*. (a) "Where

(a) 1 Hare, 152.

no probate or administration has been granted, it is of course to appoint a receiver pending a *bond fide* litigation in the Ecclesiastical Courts to determine the right to probate or administration, unless a special case can be made for not doing so." It cannot be said that the *prima facie* title of an executor who has become so fraudulently is an answer to a motion for a receiver, inasmuch as the property sought to be protected might consist of exchequer bills, foreign bonds, or bank-notes, all of which might be irrecoverably lost pending a litigation in the Ecclesiastical Court. (They also referred to *King v. King*, (a) *Watkins v. Brent*.) (b)

Mr. Rolt and *Mr. Follett*, contra. — Admitting that there is a *bond fide* litigation in the Ecclesiastical Court, and that there is property to be protected, nevertheless there is no cause whatever for the interference of this Court in the present instance, because there is a properly constituted individual to protect the property; and, as observed by your Lordship in *Watkins v. Brent*, (b) the Court does not interfere "because of the contest, but because there is no proper person to receive the assets." It may be laid down as a general proposition that the Court will not appoint a receiver against either of two parties hostile to each other, without a special case being made out for its intervention.

Mr. Malins, in reply.

THE LORD CHANCELLOR, after observing that he did not
 * 55 concur in the rule supposed to have been acted * on by the Vice-Chancellor, that in cases like the present the Court would not grant a receiver where the property was in the hands of the executor,¹ proceeded as follows: —

(a) 6 Ves. 172.

(b) 1 M. & C. 97.

¹ During litigation in the Court of Probate, a Court of Equity will entertain a bill for the mere preservation of the property of the deceased; and, if necessary, to take it out of the possession of the person claiming to be the executor, till the litigation is determined, and appoint a receiver; although the Court of Probate, by granting an administration *pendente lite*, might provide for the collection of the effects. *Ld. Red.* 135, 136; *Richards v. Chave*, 12 Ves. 462; *Edmunds v. Bird*, 1 V. & B. 542; *Atkinson v. Henshaw*, 2 V. & B. 85; *Watkins v. Brent*, 1 M. & C. 97, 102; *Wood v. Hitchings*, 2 Beav. 289; 4 Jur. 858; *Jones v. Goodrich*, 10 Sim. 327; *Anderson v. Guichard*, 9 Hare, 275; 2 Dan. Ch. Pr. (4th Am. ed.) 251, 1725; 2 Story Eq. Jur. § 907; *Osborn v.*

In order to make it advisable to incur the expense of a receiver, it must be shown that there is some property to be protected. All that is shown in the present case is, that a lady having certain property consisting of wearing apparel and trinkets, of the value of between 120*l.* and 150*l.*, carried them with her to the house of a friend, where she died; and that they are now in the hands of that party. A ground of litigation no doubt appears to exist; but the Court will not for that reason take property of such trifling value away from the person who is in possession under the will, and burden the estate with the expense of a receiver, when as yet there is no decision in the Ecclesiastical Court.

As to the alleged outstanding property referred to in the affidavit, consisting of a mortgage and shares in certain companies, there would be some grounds for the motion, as in such a case the Court would interfere, and, by the appointment of its own officer, get in and protect the property which is asserted to be in danger. It, however, appears that one of the plaintiffs is a trustee of the mortgage, so that the allegation of any danger of loss falls to the ground. With regard to the shares there is no evidence as to their amount, and in fact no evidence to show either the necessity or expediency of interfering by the appointment of a receiver.

In the course of the argument a question arose as to the particulars of which the property in question consisted.

* *Mr. Malins*, in order to show that the property in ques- * 56
tion comprised the mortgage and shares in certain companies, as well as the personal property specified in the bill, proposed to read an affidavit which had been filed since the motion was before the Vice-Chancellor.

On an objection being raised to its reception, he cited *Const v. Barr*, (a) and contended that it was quite competent to use fresh affidavits on an appeal motion.

United States Bank, 9 Wheat. 938. It was the intention of the legislature, under the 70th section of the Probate Act of 1857 to extend the powers of an administrator *pendente lite* appointed by the Court of Probate, and such administrators having the same power of protecting the property as a receiver, the Court refused to appoint a receiver. *Veret v. Duprer*, L. R. 6 Eq. 329; 2 Dan. Ch. Pr. (4th Am. ed.) 251, and note (1).

(a) 2 Russ. 161.

THE LORD CHANCELLOR. — The motion may either be treated as a motion on new grounds, or as an appeal motion. If it is a motion on new grounds the affidavit may be received, but in that case it might become necessary for me to send the whole matter back to the Vice-Chancellor on the new evidence. If, however, it is to be treated strictly as an appeal motion, the case must be dealt with on the evidence used before the Vice-Chancellor.

After some further discussion, the affidavit was permitted to be read, in order to avoid the case being again brought before the Lord Chancellor by way of appeal from any order which the Vice-Chancellor might make on having the motion renewed before him on the new evidence. (a)¹

-
- * 57 * In the Matter of The UNIVERSAL SALVAGE Company, and of The JOINT-STOCK COMPANIES WINDING-UP ACT, 1848, (11 & 12 Vict. c. 45).

Ex parte The EARL OF MANSFIELD.²

1850. January 11, 12, 14.

An allottee of shares paid the required deposit thereon, and received the scrip certificates of the shares, acknowledged the receipt thereof, and was registered as a shareholder. The company commenced operations before its capital was

(a) A similar question arose in the argument of *Fairburn v. Pearson* (before the Lord Chancellor, May 27, 1850), reported on another point, *infra*. In that case, on a motion by the defendant to discharge an order for the appointment of a receiver obtained by the plaintiff from the Vice-Chancellor of England, the plaintiff filed fresh affidavits in support of the order. The defendant objected to their being read, on the ground that the plaintiff was only sustaining an order; but the Lord Chancellor admitted the plaintiff's affidavits, and also affidavits filed by the defendant in reply.

¹ The Court of Appeal may, if it thinks fit, allow new evidence to be used before it; 2 Dan. Ch. Pr. (4th Am. ed.) 1369; *Re Joseph & Webster*, 1 R. & M. 496; *Pole v. Joel*, 2 De G. & J. 285; *Re Dixon*, 3 Jur. N. S. 29, L. JJ.; unless the application is to discharge the order as having been made on insufficient evidence; in which case, the Court will only receive the evidence made use of on the former occasion. *Tanner v. Carter*, 1 C. P. Coop. t. Cott. 337; 2 Dan. Ch. Pr. (4th Am. ed.) 1152, 1367.

² S. C., 3 De G. & S. 58.

fully subscribed, but afterwards discontinued its business as unprofitable, the scheme being neither fraudulent nor abortive. The allottee was held to be a contributory, although he had not signed the deed of settlement, nor paid any of the calls when demanded, nor taken any part in the affairs of the company.¹

Observations by the Lord Chancellor on the effect of placing the name of a person on the list of contributories.

Observations on the effect of placing the name of a person on the list of contributories of a company.

THIS was a motion by way of appeal on the part of the Earl of Mansfield, to discharge an order of the Vice-Chancellor KNIGHT BRUCE, who had decided that his Lordship's name should be included in the list of contributories of the above company.

The company was projected in April, 1844, before the passing of the Joint-stock Companies Registration Act, and issued a prospectus dated in October, 1844, stating its purposes, and directing applications for allotments of shares to be made at the offices of the company. These applications were to be made according to a printed form of letter, whereby the applicant agreed, upon the allotment being made to him, to pay the sum of 5*l.* deposit for each share, and thenceforth to hold the same upon the conditions indorsed on such shares, and for the purposes mentioned in the prospectus. The Registration Act having passed, the promoters of the company, in January, 1846, caused it to be completely registered as an existing company. In June, 1845, Lord Mansfield, through his brother Mr. Murray, who was chairman of the company, applied for and obtained an allotment of twenty shares. The scrip certificates issued to the allottees were in the following form:—

* “The Universal Salvage Company.

* 58

Registered according to Act of Parliament, 7 & 8 Vict. c. 110.

Capital 100,000*l.* in 4000 shares of 25*l.* each.

Deposits 5*l.* per share.

Certificate for one share, No. —

This is to certify that the holder of—— is the proprietor of one share in the Universal Salvage Company, and is entitled to all

¹ See *Sharpus's Case*, 3 De G. & S. 49; *Bird's Case*, 1 Sim. N. S. 47; *Yelland's Case*, 5 De G. & S. 395; 16 Jur. 509; *Hawkins's Case*, 2 K. & J. 253; *Blackburn's Case*, 3 Drew. 409; S. C., on appeal, *nom. Ex parte Hutchinson*, 25 L. J. Ch. 722; *Ex parte Burton*, 16 Jur. 967.

benefits and advantages of the same, subject to the conditions printed on the back hereof, and to the other regulations of the company. London, dated the — day of — 1845.

A. B. }
C. D. } Directors.
E. F. }

Entered vol. — page —

(Date) .

W. R. Secretary."

Lord Mansfield, on receiving the scrip certificate of the shares allotted to him, wrote a note to the secretary of the company, bearing date the 30th June, 1845, in the following terms: "I beg to acknowledge the receipt of twenty provisional shares in the Universal Salvage Company." Mr. Murray paid the deposit on these shares with money supplied to him by Lord Mansfield. The company's deed of settlement, which was dated in August, 1845, differed from the prospectus in several particulars. In July, 1846, a call was made, a notice of which was sent to Lord Mansfield, but he paid no attention to it; and he never took any part in the proceedings of the company, although notices of its meetings were regularly sent to him. Lord Mansfield's name was inserted in * 59 the registered list of * shareholders filed in September, 1846.

The company's capital was never fully subscribed, no more than 2000 shares having been applied for. The company, however, commenced business, and undertook various operations for the recovery of wrecks; but the expenses having proved unexpectedly large, the directors determined to abandon the scheme and incur no further liabilities.

In Michaelmas term, 1848, an order was made by the Vice-Chancellor KNIGHT BRUCE for the dissolution and winding up of the company; and the official manager inserted the name of Lord Mansfield in the list of contributories, as the allottee of twenty shares. On the settlement of the list before the Master, Lord Mansfield claimed to be excluded, and the Master decided accordingly. This decision, however, was in effect reversed by the Vice-Chancellor, and Lord Mansfield thereupon appealed to the Lord Chancellor.

The facts above stated will be found sufficient by way of introduction to the following arguments, and to the judgment given by the Lord Chancellor. The full particulars of the case, together

with the reasons of the Master for his decision, will be found in the 3d volume of Messrs. De Gex and Smale's Reports, pages 48 and 49.

Mr. Malins and *Mr. Glasse*, for Lord Mansfield. — The directors of this company have proceeded with the undertaking without having the whole capital subscribed, while by their advertisements they professed to have received more applications for shares than they could comply with; this in itself would have entitled * Lord Mansfield to have recovered back his deposit. *Nock- * 60 els v. Crosby*, (a) *Walstab v. Spottiswoode*, (b) *Wontner v. Shairp*. (c)

[THE LORD CHANCELLOR. — Was there in the present case any actual misrepresentation, for the cases referred to proceed on that ground ?]

There has not been any positive misrepresentation, but the purpose for which the money was subscribed having become abortive, an action would, on the authority of *Walstab v. Spottiswoode*, (b) lie against the directors for money had and received.

[THE LORD CHANCELLOR. — In that case there was an abandonment of the undertaking; in the present, although the undertaking has failed, there has been an attempt to carry it on.]

The directors had no authority, express or implied, to apply the deposit to a partial execution only of the purpose for which it was subscribed. Those persons only who are liable to pay the debts of the company ought to be placed on the list of contributories, and these would be the directors and those members who sanctioned the operations of the company being carried on with a reduced capital.

[THE LORD CHANCELLOR. — There can be no contributory to a debt, and if the liability were limited as contended for, there could in fact be no winding up.]

(a) 3 B. & C. 814.

(b) 15 M. & W. 501.

(c) 4 Railway Cases, 542; S. C., 4 C. B. 404.

* 61 *In the case of *Fox v. Clifton*, (a) it was held, that a creditor of a company proceeding against an individual alleged to be a member, and under circumstances precisely similar to the present case, had no claim against the individual member. Thus it is clear, that at law Lord Mansfield could not have been reached; and under these circumstances, we submit that he is not a contributory within the meaning of that term as used in the statute, which must be taken to comprehend those members only who are legally liable.

Mr. J. Russell and *Mr. H. Prendergast*, for the official manager. — The company, although formed before the Registration Act, have availed themselves of its provisions, and were duly registered; and as such they were a complete corporation by law. The scheme never was abandoned as was the case in *Nockels v. Crosby*; (b) but after it was fairly launched, it proved an unfortunate speculation. By the payment of the deposit Lord Mansfield was admitted into full membership of the company; and the Winding-up Act does not limit the liability to contribute to those only who are the directors or projectors of the company, nor even to those who are members only, for, by the definition of the word “contributory,” others than members may be included. Although Lord Mansfield did not sign the deed, yet signature is not necessary for perfecting a party’s position as a shareholder, *Clements v. Todd*, (c) any more than it is to entitle a party to the benefit of a composition

* 62 deed. *Ex parte Sadler*. (d) By the 155th * and 156th clauses of the deed of settlement, by which Lord Mansfield was bound, certain formalities are prescribed by means of which a member may relieve himself of the shares; but the mere omission to pay calls could not relieve him. As to the whole number of shares not having been subscribed for, it was not necessary; for, by the 7th section of the Act 7 & 8 Vict. c. 110, it is sufficient, for the purpose of complete registration, that the deed has been signed by one-fourth of the persons who at the date of the deed have become subscribers; and an individual otherwise liable cannot assert an immunity by showing that the whole number of

(a) 6 Bing. 776.

(c) 5 Railway Cases, 132.

(b) 3 B. & C. 814.

(d) 15 Ves. 52.

shares was not subscribed for. *The London and Brighton Railway Company v. Wilson.* (a)

Mr. Malins, in reply. — The object of the Winding-up Act was not to create any new liability. This is proved by the 58th section ; and, therefore, the projectors of a company alone are responsible to creditors, as decided by *Fox v. Clifton* (b) and *Walstab v. Spottiswoode.* (c)

[THE LORD CHANCELLOR. — Previously to the formation of every company there must necessarily be considerable expense incurred ; for instance, in case of a railway company there must be a previous survey of the intended line. What is the difference in point of liability to contribute to such preliminary expenses between the case of twenty projectors, and that of an individual who comes in subsequently upon a fair representation, and without any fraud ?]

* The case of *Jarrett v. Kennedy* (d) shows that *Clements v. Todd*, (e) referred to on the other side, is not inconsistent with the authority of *Walstab v. Spottiswoode.* (c) * 63

[THE LORD CHANCELLOR. — In the case of *Walstab v. Spottiswoode* (c) there was no scrip certificate ; but in the present case, the scrip certificate having been received by Lord Mansfield, and he having paid the required deposit, a contract was constituted.]

The 3d section of the Winding-up Act defines a member to be one “ entitled to a share of the assets or accruing profits ” of the company at the date of the petition for its dissolution ; and Lord Mansfield had clearly no such right, for by the non-payment of calls all his interest in the company was forfeited. *Prendergast v. Turton.* (g)

[THE LORD CHANCELLOR. — That was a case of lying by. Could not the company have enforced another call if Lord Mansfield had declined to pay ? The mere lapse of time and non-payment of the

(a) 1 Railway Cases, 530.

(b) 6 Bing. 776.

(c) 15 M. & W. 501.

VOL. II.

(d) 6 C. B. 319.

(e) 5 Railway Cases, 132.

(g) 1 Y. & C. C. C. 98.

calls would not constitute a forfeiture, or debar him from participating in the profits of the concern, for in such a case, if he filed his bill for the purpose, he would of course tender the calls which were due. The 3d section of the Winding-up Act seems to contemplate that a party may be a member, though not liable to contribute generally. It is not necessary that he should be liable for all the expenses of the concern : the question is, whether he is liable for any part of such expenses.]

If the projectors had stopped this concern before registration, it is obvious that they could not have * thrown the participation of the debts on Lord Mansfield. There is no reason why they should be permitted to do so, because after registration they have had the temerity to proceed with an undertaking at variance with their prospectus.

January 14.

THE LORD CHANCELLOR. — I have found considerable difficulty in disposing of this case, on account of the very meagre materials upon which I am forced to form an opinion. A great deal has been brought forward in the course of the argument at the bar relative to the conduct of the persons who composed the managing committee of the Universal Salvage Company ; and other circumstances have been introduced which would have had much weight in the formation of my decision, if they had appeared in the report of the evidence before the Master. The Court is however bound by the Act of Parliament to confine itself to the facts that were before the Master ; and thus though statements have been made at the bar, yet as they were unsupported by any evidence, the Court has in fact nothing on which it can proceed in deciding on the conclusions to be drawn from them. The Master might have had before him all the facts which have been referred to ; but if he had, there is no trace of them in the statement of the evidence. If there are further facts brought out in the case of the nature described by counsel in the argument they may be rendered available hereafter ; but for the purpose of the present petition it must be assumed that the statement of the evidence before the Master contains a statement of all the facts actually brought under his notice. Now,

* 65 all that I find stated is, that there was an application * for shares, and that the shares of the Universal Salvage Com-

pany, numbered from 774 to 794, were allotted to the Earl of Mansfield. The application for the shares appears to have been made by Mr. Murray, his Lordship's brother, in June, 1845; and in 1846 their receipt was acknowledged by Lord Mansfield in a letter addressed to the secretary of the company, to whom at the same time the deposit of 5*l.* per share was paid. It therefore appears on the proceedings that there was an application for shares by Mr. Murray, and that Lord Mansfield sanctioned that application by taking them and paying the deposit. The evidence also shows that Lord Mansfield was applied to on a subsequent occasion for the payment of a call made on these shares, and that the letter so calling for payment was not returned. What is meant by that phrase does not appear to be very clear.

(*Mr. Malins* suggested, that it probably meant that the letter was not returned to the office as from a person whose address could not be found.)

However that may be, it appears that Lord Mansfield paid the deposit before the scrip was issued, and afterwards received the scrip. Now that being the state of things, matters went on in the usual way, and the company's deed was registered in compliance with the provisions of the Act of Parliament. Whether the capital of 100,000*l.* required by the company has ever been fully subscribed, or whether the directors have dealt with the funds of the company in a manner unauthorized by the subscribers, does not appear from the materials before me. It appears, however, that Lord Mansfield considered himself absolved from any liability, and not bound to continue his connection * with the company, * 66 because the designs of the projectors had not been carried out.

The Act of Parliament (7 & 8 Vict. c. 110) provides, that upon the registration of a company, a list shall be made out, not only of those persons who have signed the deed, but of those who have not, and who have merely received an allotment of shares and paid the deposit. Lord Mansfield, having paid his money and received his scrip, was accordingly registered with the other subscribers. It is true there was a condition attached and indorsed on the certificate, that there was to be a capital of 100,000*l.*, raised by 4000 shares, but how did the matter really stand, and what was the

agreement in effect? It was in substance this, that Lord Mansfield, on paying the deposit money, was to receive certain scrip entitling him to a share in the profits to be realized by the company. There was thus then a stipulation that he was to receive all benefits arising from the possession of that scrip; and therefore having paid the deposit money, the contract was complete.

Now the Joint-stock Companies Winding-up Act has said, that all members who so accept shares are liable to contribute. It has however been contended, on the authority of a class of cases referred to, that a person is not liable to contribute who cannot be sued as a member of the company by a creditor. But the words of the Act are that the term "contributory" is to include every member of a company, and also every other person liable to contribute, &c. In the present case a partnership in the strict sense of the word may not have existed, but the acts done by persons in the situation of Lord Mansfield held out to the world a notice of an association

for the particular object stated by the promoters of the company; and the Winding-up * Act makes no distinction between persons who have or have not done particular acts, provided they have become members of the company. Was not Lord Mansfield, therefore, a member of the company as a person who had a claim to participate in the profits that might be realized? It may or may not turn out on further investigation, that Lord Mansfield has relieved himself from the responsibility of being held a member; but no evidence of that is now before the Court; and I therefore think I must adopt the course taken by the Vice-Chancellor.

While I am on this subject, I think it as well to take notice of a very erroneous impression with regard to the operation of the Winding-up Act. It seems to be assumed, that when the name of a person is once placed on the list of contributories, such person is liable to contribute to all the expenses that have been incurred by the management of the company. This is not the intention of the Act, nor is it the effect of its provisions. When the Master has placed on the list all the persons found by evidence to have been members of the company, he then commences the process of distributing the payment of the losses: but it is not to be assumed that a person whose name is placed on the list becomes liable to pay an equal share of those losses. There is a general loss to be defrayed, but the directors of the company may in a greater or less degree have added to that loss by their mismanagement. Some of

the subscribers may have sanctioned or adopted those acts of mismanagement; but the body of the shareholders are not liable to contribute to the payment of expenses so improperly contracted; and it is for the Master to ascertain and distribute the contribution according to the degrees of liability.

* After some further discussion, the Lord Chancellor ordered * 68 that Lord Mansfield should have leave to produce before the Master a fuller statement of the facts upon which he relied as exempting him from liability to contribute; but that he should pay the costs of the original petition, and of the appeal.

PADLEY v. THE LINCOLN WATER WORKS COMPANY.¹

1850. January 16.

A bill filed against an arbitrator charged fraud and collusion between the arbitrator and one of the parties to the award, and alleged certain specific facts in support of this charge. *Held*, that the arbitrator could not, by denying the fraud generally, protect himself from the obligation to answer the interrogatories as to the specific facts.

The 38th Order of the 26th August, 1841, enables a defendant to decline answering such interrogatories only as anterior to that order he might have protected himself from answering by demurrer.

THIS was an appeal from the decision of the Vice-Chancellor KNIGHT BRUCE, holding the answer of Thomas Hawksley one of the defendants to be insufficient.

The bill was filed by James Sandby Padley against the Lincoln Water Works Company and Thomas Hawksley their engineer, to recover the balance due to the plaintiff in respect of certain works contracted to be executed by him for the company, the amount of which was under the terms of the contract to be certified by T. Hawksley. The bill charged generally fraud and collusion between T. Hawksley and the company in respect of the certificates which T. Hawksley had made out, and alleged particular facts in support of this general charge. The bill then interrogated in reference to these facts.

¹ S. C., 14 Jur. 299.

T. Hawksley, by his answer, positively denied the charge of fraud and collusion; but declined answering the interrogatories as to the particular facts, on the * ground that they were irrelevant and immaterial, and of such a nature as to give him, by reason of his character of arbitrator, a right to decline answering.

The following are the interrogatories which the defendant so declined to answer: Whether the works so directed to be omitted, and the prices whereof were fixed by the said schedule of prices at the end of the said specification, did not amount in the whole to the sum of 963*l.* 12*s.* 11*d.*, or to some other and what sum? Whether the work so directed to be omitted, and the values whereof were not capable of being ascertained by the prices at the end of the said specification, did not amount, according to a fair valuation thereof made by the plaintiff, to the sum of 70*l.* 19*s.*, or to some other and what sum? Whether the additional works and variations made by the plaintiff, pursuant to the said memorandum of agreement, did not amount together, according to the schedule of prices at the end of the said specification, to the sum of 1275*l.* 3*s.* 11*d.*, or to some other and what sum? Whether the additional works and variations made by the plaintiff, pursuant to the said memorandum of agreement, the value whereof could not be ascertained by the said schedule of prices at the end of the said specification, did not amount to the said sum of 263*l.* 7*s.* 4½*d.*, or to some other and what sum? Whether the whole amount of the works done by the plaintiff for the defendants, the Lincoln Water Works Company, under and by virtue of the memorandum of agreement of the 2d November, 1846, after allowing for the works so omitted to be done as aforesaid, did not amount together to the sum of 5003*l.* 19*s.* 4½*d.*, or to some other and what sum?

The plaintiff having excepted to the defendant's answer, * 70 but the Master having disallowed the exceptions, * the case was brought by exception to the Master's Report before the Vice-Chancellor, who, on the 17th November, 1849, decided in favour of the plaintiff, holding that the questions were relevant and material, and that, both on principle and authority, the answer was insufficient. The defendant T. Hawksley now appealed to the Lord Chancellor.

Mr. Bacon and *Mr. Glasse*, in support of the appeal. — The

defendant has distinctly denied any imputation of fraud, and simply declines to give the *data* upon which he has arrived at his conclusions. An individual who has been chosen by the mutual consent of both parties to act as arbitrator, cannot be called upon to give the reasons for his award any more than a Judge can be compelled to produce his notes. *Scougull v. Campbell*. (a) Lord HARDWICKE lays it down in an anonymous case reported in *Atkins* (b) that, if there be a palpable mistake or miscalculation made by an arbitrator in an account, the party aggrieved may bring his bill against the party in whose favour the award is made to have it rectified, but not against the arbitrator. The only ground on which the defendant can be called on is that of fraud; but that is wholly denied. It is clear that the arbitrator may plead the award in bar, although it may be defective in law, *Lingood v. Croucher*; (c) and in the case of *Steward v. East India Company*, (d) the objection was sustained on demurrer by the arbitrator, though fraud was charged.

[THE LORD CHANCELLOR. — That authority would not be recognized now.]

* It is wholly immaterial to the plaintiff's case that this * 71 arbitrator should disclose the *data* on which he has arrived at his conclusions, because the plaintiff may establish his case at the hearing, when he will have his remedy; and if he can substantiate the charge of fraud, this defendant will have to pay the costs. By the 38th Order of August, 1841, a defendant may by answer protect himself from discovery.

[THE LORD CHANCELLOR. — That order was made with the view to the materiality of the interrogatories as to which formerly a defendant might have demurred, and by that order a party may now decline to answer any question from which he might have protected himself by demurrer. It is not contended that this defendant could have demurred to these interrogatories which he has declined to answer, and if he could not, it is obvious the order will not protect him.]

(a) 1 Chitty, 283.

(b) 3 Atk. 644.

(c) 2 Atk. 395.

(d) 2 Vern. 380.

Mr. Wigram and *Mr. Hallett*, contra, were not called on by the Lord Chancellor.

THE LORD CHANCELLOR.—It appears to me very clearly, that in this case the Vice-Chancellor is right. It is true that an arbitrator, if he takes proper means to clear himself from the imputation of fraud, is not bound to state the reasons of his award, because he is acting as Judge, and has a right under that character to protection. If, however, any fraud is imputed he must so frame his defence as to disprove the imputation of fraud, otherwise that takes away the protection which belongs to his character of arbitrator.¹

In the present case there are general allegations of fraud * 72 and collusion between the arbitrator and other * parties; and particular facts are alleged as evidence of the fraud. The arbitrator cannot protect himself from that charge by denying the result of the facts, and negating those facts from which the fraud is inferred, because by so doing he takes upon himself to be the judge in his own case, and to say that he is not guilty of a fraud. He may not call it fraud, but probably the Court may call it so; and as long therefore as those charges are suggested against him which are alleged to show the fraud, and until there is an opportunity of trying the whole truth, he cannot refer to his character of arbitrator for the purpose of protection.²

Having then submitted to answer, I think that the defendant is bound to answer these questions, which are clearly not immaterial for the purpose of the case as stated by the bill.³ He must admit that he cannot decline to answer them under the 38th Order of August, 1841, because they are questions which, anterior to that order, were not so immaterial that they could have been demurred to, and as to which he could not have protected himself from answering. There is therefore not only the principle of the Court as to arbitrations, but also the form and rule of the Court as to answers, which compel him to answer these questions.

There being circumstances by which, if they should be admitted,

¹ 1 Dan. Ch. Pr. (4th Am. ed.) 297, 671.

² See 1 Dan. Ch. Pr. (4th Am. ed.) 297, 298, 721, 722; *Ponsford v. Swaine*, 1 J. & H. 433.

³ 1 Dan. Ch. Pr. (4th Am. ed.) 720, 721, 722, and notes.

the plaintiff contends that the fraud which he imputes would in some degree be established, I am clearly of opinion that as the matter stands upon these pleadings the defendant is bound to answer, and that the present appeal must be dismissed with costs.

* In the Matter of G. E. F. WARD (a Lunatic, not found * 73
such by Inquisition),

AND

In the Matter of the Act 1 Will. 4, c. 60.

1850. January 16.

On petition under the Act 1 Will. 4, c. 60, the Court never interferes in the administration of the trusts, but merely substitutes a trustee in the place of the lunatic.

THIS was the petition of Thomas Minchin and John Thomas Mace and Mary Ann his wife. The ultimate object sought by the application was the conveyance of an estate, vested in the lunatic as trustee to the petitioners Thomas Minchin and Mary Ann Mace, they being entitled under the will of Henry Hunt to the moneys which would arise from the estate, if sold as by the will directed. The petition prayed a reference to inquire whether G. E. F. Ward was lunatic, and trustee of the estate, and for whom.

Mr. T. H. Hall, for the petitioners.

THE LORD CHANCELLOR said, that wherever there remained any portion of the trusts of an instrument to be executed, the Court had invariably declined to administer the trust; that in the present instance, the trusts not being at an end, the petition sought for a conveyance of the trust premises to the *cestui que trusts*; that the 22d section of the Act 1 Will. 4, c. 60, only authorized the Lord Chancellor to appoint a new trustee in the place of the lunatic; and that the reference must therefore be extended to the appointment of a new trustee. (a)

(a) A similar application to that above reported was made on the same day (in the matter of Foyster), and was refused by the Lord Chancellor on the same grounds.

* 74 * M'INTOSH *v.* The GREAT WESTERN Railway Company and others.

1850. January 19, 21, 22. June 4.

In a suit arising out of a contract between the plaintiff and the defendant, it appeared that if the contract had been correctly acted on the plaintiff would have had a legal right against the defendant, but that he was deprived of this right by the acts of the defendant and his agents: *Held*, under these circumstances and on demurrer to a bill filed for discovery and for relief according to the terms of the contract, that for the defendant to use these acts as a means of defeating the plaintiff's remedy was a fraud which the Court would interfere to prevent, and also that it was no answer to the plaintiff's claim to say that the conduct of the defendant rendered him subject to an action for damages by the plaintiff.¹

THE bill in this case, which was very voluminous, was filed by the executors of the late Hugh M'Intosh against the Great Western Railway Company, their secretary Charles Alexander Saunders, and their principal engineer Isambard Kingdom Brunel. To this bill the company, and the two other defendants, filed separate demurrers, which were overruled by the Vice-Chancellor KNIGHT BRUCE on the 14th December, 1849; and from this decision the company now appealed.

The statements and allegations on which the plaintiffs principally relied in support of their claim in equity, were to the following effect.

The bill stated that in August, 1836, Hugh M'Intosh tendered for and undertook to execute certain works for the Great Western Railway Company, according to plans and specifications exhibited to him by the company, and that such tender was accepted by the company; that by an indenture, bearing date the 5th November, 1836, and made between the company under their common seal of the one part, and H. M'Intosh of the other part, after reciting that H. M'Intosh had contracted with the company to execute the whole of the works described or mentioned in the specification,

according to the drawings or plans, to the satisfaction of
* 75 the company and of * their principal engineer appointed or

¹ See *Re The Brighton Club and Norfolk Hotel Company*, 13 W. R. 733, M. R.; *Munro v. The Wivendon and Brightlingsea Railway Company*, 13 W. R. 880.

thereafter to be appointed, and to execute and perform the whole of such works and each and every part thereof within the period or respective periods thereafter limited, and that the company had agreed to advance to the said H. M'Intosh from time to time during the progress of the works so contracted to be executed by him sums of money by way of instalments as was thereafter mentioned on account and in part-payment of the work then actually done and executed by the said H. M'Intosh, such execution to be certified by the said I. K. Brunel or the principal engineer for the time being of the said company, and after completion of the works (such completion also to be certified as thereinbefore mentioned) the said H. M'Intosh was to receive and be paid the remainder of the moneys due to him upon the said contract at the times and in the manner therein mentioned; it was, among other things witnessed that, in consideration of the sum thereafter agreed to be paid by the company and of such further sums for extra works as thereafter also mentioned, he the said H. M'Intosh covenanted well and substantially and in a good, lasting, and workman-like manner to do, make, execute, and complete all the works whatsoever, whether temporary or permanent, described in the specification thereunder written, in the order or course and in the manner specified in the same specification, according to the directions and instructions contained in the specification and drawings and such additional or other instructions and drawings as should from time to time be given or furnished by the principal engineer or assistant resident engineer for the time being of the company as thereafter mentioned, and further, that the said works should be commenced and the whole of the same fully completed within the time or respective times, in the specification mentioned; and the said H. M'Intosh * further covenanted to execute and com- * 76

plete all the works with such materials as in the specification mentioned and in the most workman-like manner to the satisfaction in all things of the company and their principal or assistant resident engineer then already appointed or thereafter to be appointed; and that it was by the indenture agreed that the works in the specification described as extra works should be deemed and considered as included in the covenants and agreements thereinbefore contained on the part of the said H. M'Intosh, and should be paid for by the company at the times after the

rate and in the manner thereafter mentioned, and that if the company should think proper at any time or times to make any alterations, additions, or omissions to or in the several works including such extra works, they should be at liberty to do so upon giving to the said H. M'Intosh written instructions for such alterations, additions, or omissions signed by two of the directors of the company, or by their principal or assistant resident engineer for the time being, but that the said H. M'Intosh should not be considered as having authority for any alterations, additions, or omissions, nor as entitled to make any claim for the value or in respect of the same without such written instructions, although such alterations or additions might have been actually executed by the said H. M'Intosh; and further, that the period by the specification limited or appointed for the completion of the works or any part thereof should not be altered or affected by reason of any such alteration, addition, or omission, unless and except so far as the principal engineer for the time being should by writing under his hand certify that the period limited for the completion of the works or any part thereof ought to be extended in consequence of any such alteration, addition, or omission; and

further, that all such additional or altered work should be * 77 ascertained and * valued by admeasurement and valuation in all respects according to or by comparison with the price of labour and several articles respectively set forth in the schedule of prices annexed to the tender which the said H. M'Intosh had made in respect of the works thereby contracted for, and that the value thereof so ascertained should be added to or deducted from the amount of the contract, as the case might be, and the addition in value if any paid for in the manner and at the time or times thereafter mentioned; and it was by the indenture further declared and agreed, that where the word "engineer" was contained in the specification, the word "engineer" should be read and construed as meaning such principal engineer or assistant resident engineer, unless such construction should be inconsistent with the context of the specification, and except as to the certificates of the due execution of any of the works or any other matters therein contained as to be done solely by the principal engineer for the time being of the company; and it was thereby also agreed, that if the said H. M'Intosh should be prevented from or materially impeded or delayed in the proceeding with or com-

pletion of any of the works which under the contract ought to be performed and executed by the said H. M'Intosh, by reason or in consequence of any acts which might, contrary to the true intent and meaning of the indenture and of the specification, be done or omitted to be done by the company or any authorized engineer or agent on their behalf or any person or persons with whom the company had contracted or might contract for the execution of any works, such prevention, impediment, or delay should not vacate the indenture or otherwise affect the same, except that in any such case the principal engineer for the time being of the company should determine whether any, and if any what extension of time ought to be allowed for * the * 78 execution and completion of all or any of the works thereby contracted for, and whether any and if any what compensation or allowance ought to be paid or allowed to the said H. M'Intosh in respect of such prevention, impediment, or delay, and in what manner such compensation or allowance ought to be paid or allowed, and the determination of such principal engineer for the time being should be binding and conclusive on all parties; and it was further witnessed that in consideration of the premises and of the covenants thereinbefore contained on the part of the said H. M'Intosh, the Great Western Railway Company covenanted that they would pay the sum of 27,950*l.*, which had been agreed to be paid for the completion of the works (exclusive of extra works) and for providing the materials for the same, at the times and in the manner following (that is to say), that the company would at the expiration of fourteen days, to commence and be computed from the day on which the works thereby contracted to be done should have been commenced, pay unto the said H. M'Intosh four-fifth parts of the whole value of the works which should have been executed, such value to be estimated by the principal engineer or assistant resident engineer for the time being, having regard as well to the prices set forth in the schedule to the tender as also to the entire cost of the whole of the works (except extra works), the execution of such works to be certified from time to time by the principal engineer as thereinbefore mentioned, and so from time to time at the expiration of every succeeding fourteen days in like manner should pay unto the said H. M'Intosh four-fifth parts of the whole amount or value of the works which should have been actually executed during the preceding fourteen

days, until the one-fifth part or twenty per cent to be retained

* 79 from time to time by the company should either * alone or altogether with the sums to be retained out of the estimated value of the extra works which might be executed and certified from time to time as thereafter mentioned, amount to the sum of 2000*l.*, and would thenceforward until the whole of the works thereby contracted to be done should be completed, at the expiration of every fourteen days pay unto the said H. M'Intosh the full value of the works (to be ascertained and certified as aforesaid) which should have been executed in the preceding fourteen days, and should at the expiration of one calendar month after the whole of the works thereby contracted to be done were completely finished to the satisfaction of the principal engineer of the company, to be certified by him in manner thereafter mentioned, pay unto the said H. M'Intosh his executors, administrators, or assigns the sum of 1000*l.* being one equal half part of the moneys to be so retained by the company as aforesaid without any interest thereon, and should at the expiration of one calendar month after the termination of the year during which the works were covenanted to be kept in repair by the said H. M'Intosh as thereinbefore mentioned (the same having been certified by the engineer in the same manner as the completion of the works), pay to the said H. M'Intosh his executors, administrators, or assigns the sum of 1000*l.*, being the balance of the sum to be so retained by the company, together with interest on such balance at the rate of 4*l.* per cent to be computed from the day on which the whole of the several works should have been so completed; and further, that the company should pay unto the said H. M'Intosh for or in respect of the extra works thereinbefore contracted to be executed by him, at and after the prices in that behalf mentioned or referred to in the specification thereunder written and set forth

* 80 in the schedule to the tender * (the amount and value of such extra works to be from time to time certified by such principal engineer), and to be paid and payable in the same manner and subject to the same deductions as above directed with respect to the said sum of 27,950*l.*, provided nevertheless that the works thereby contracted to be executed or any part thereof should not be deemed or considered as executed unless the same should have been executed within the time specified for that purpose by the indenture to the satisfaction of the said principal engineer for the

time being, and should have been certified by him to have been so executed, and that on notice being given by the said H. M'Intosh for that purpose the said principal engineer or assistant resident engineer for the time being should without delay examine the works which from time to time should be alleged to have been executed by the said H. M'Intosh pursuant to the contract, and then if the same should have been so executed the said principal engineer for the time being should certify the same to the company, and thereupon the said H. M'Intosh should be entitled to recover from the company the amount of the moneys then due in respect of the works so certified to have been executed, subject to the retaining thereof of such sums as thereinbefore in that behalf mentioned.

The bill then stated that, in consequence of the neglect of the company in delivering possession of the lands, H. M'Intosh was for a considerable period actually prevented from prosecuting the works, and that their execution extended over a longer period of time than would have been required if the company had supplied the land; that throughout such longer period of time, H. M'Intosh was under the necessity of paying the wages of the workmen hired by him for the performance of the works, and whom it * was necessary to retain; and that he was also under the * 81 necessity of maintaining the horses which he had provided for the like purpose; and that by these means he had sustained great loss and injury, and was in consequence entitled under the contract to compensation and to an extension of time; that in May, 1837, the company entered into an agreement with H. M'Intosh, by which they agreed to allow him a bonus or premium of 2500*l.* if certain of the contracted works were completed in September instead of November, 1837; that H. M'Intosh performed his part of this agreement, but the actual execution thereof was prevented by the fault of the company; that certain extra works in the bill specified were performed by H. M'Intosh under the orders of I. K. Brunel, and that during the execution of the same Robert Archibald as the assistant engineer and acting under the authority and directions of I. K. Brunel superintended the performance of such extra works according to the orders and plans for that purpose provided by I. K. Brunel, and prepared draft certificates in respect of portions of the works to be afterwards approved and signed by I. K. Brunel; that all the draft

certificates so prepared by R. Archibald were defective, and that the amount of work by such several draft certificates stated to have been performed was considerably less than the amount of work which from time to time had been actually performed by H. M'Intosh, and the sums thereby respectively expressed to be payable in respect of such works, were in each case considerably less than the sums to which H. M'Intosh was entitled according to the terms of the contract; that from time to time as the several portions of the works comprised in or relating to the contract were completed by H. M'Intosh, the same were immediately delivered by him to the company, who immediately took possession thereof for the purpose of laying thereon the permanent way for traffic; that although H. M'Intosh duly performed his part of the contract in every respect, and from time to time during the execution of the works comprised therein or relating thereto, gave due and sufficient notice according to the terms of the contract for the purpose of obtaining certificates of the portions of works which had from time to time been so executed, nevertheless the company and their principal engineer in numerous instances neglected and failed to issue the proper certificates of the works executed, whereby H. M'Intosh was greatly injured and damaged; that instead of the principal engineer examining and truly and correctly certifying as he ought to have done at the end of every period of fourteen days from the commencement of the works, the whole of the works then executed and completed by H. M'Intosh and the full amount payable to him in respect thereof, he the said principal engineer made and issued his certificates of the work done at irregular periods, and for the most part at greater intervals than fourteen days, and such certificates were for and in respect of portions only and not the whole of the works which at the respective times of making and issuing the same had been executed and which had not been previously certified, and such certificates were in many instances for sums of money less than the sums properly payable to H. M'Intosh in respect of the works thereby certified; that I. K. Brunel and the directors of the company had frequently admitted that the several amounts so returned as therein mentioned in respect of the works so comprised in such certificates were merely arbitrary sums inserted in the certificates at the discretion of the principal engineer in order to provide H. M'Intosh with the means of pro-

ceeding with the works; that under the circumstances no correct or accurate account was * taken by the company of * 83 the sums of money due to H. M'Intosh in respect of the works executed by him under the contract, or of the particular works specified to have been executed by him in such certificates; that H. M'Intosh did not acquiesce in the certificates so issued, or the payments so made to him, but on the contrary objected to and complained of the same, and of the inaccuracy, incorrectness, and insufficiency thereof, and frequently applied to the company and their engineers, and particularly to the principal engineer, for more correct and further certificates and payments; that H. M'Intosh from time to time furnished to the principal engineer accounts or statements of the works and quantities of works for the time being executed and completed by him and for which certificates ought to have been issued, and applied for payment of the amounts thereby shown to be and which in fact were due to him; that in particular on the 28th December, 1837, H. M'Intosh made out and delivered to I. K. Brunel an account of the works which had up to that period been executed by him upon the line in pursuance of the contract and of the orders of the company and of their principal and assistant engineers, by which account it appeared that after giving credit for all sums received from the company in respect of the works executed under the contract there was then due from the company to H. M'Intosh in respect of such works a balance or sum of 5531*l.* 3*s.* 11*d.*; that such sum of 5531*l.* 3*s.* 11*d.* in fact represented the value of the works executed by H. M'Intosh up to the date of the account, but which by reason of the neglects and irregularities of the engineers in respect of the certificates had not been certified or returned by them; that the said sum of 5531*l.* 3*s.* 11*d.* ought to have been paid at the times when the several portions thereof respectively became due and payable; * that this account was in the year 1838 * 84 examined and investigated and adjusted and approved, and the said balance of 5531*l.* 3*s.* 11*d.* agreed to by I. K. Brunel acting as such principal engineer, and as the agent and by the authority and on behalf of the company; that such account had not at any time since been disputed or questioned by the company or their agents; that immediately upon so agreeing to the balance of the said account the said I. K. Brunel ought to have certified the same to be justly due and owing to H. M'Intosh, nevertheless the said

I. K. Brunel did not certify the said sum to be due to H. M'Intosh nor did the company pay the same; that on the 24th November, 1838, H. M'Intosh made out and delivered to I. K. Brunel another account claiming a sum of 2320*l.* 13*s.* 9*d.* for works executed by him since the said account of the 28th December, 1837; that this account was received and examined by I. K. Brunel, and although the several items were for the most part approved by him, and although the several works in respect of which the several items were respectively charged or the greater proportion thereof had by certificates which had been previously issued in the course of the execution of the same works been certified to have been and were in fact duly executed by H. M'Intosh, nevertheless I. K. Brunel refused to certify for the said account or any part thereof, and that H. M'Intosh was unable to obtain payment of the amount due upon the said account or any part thereof, and that the entire sum of 2320*l.* 13*s.* 9*d.* due upon such account remained still due and owing to the estate of H. M'Intosh together with interest thereon; that the accounts so furnished did not include the bonus or premium of 2500*l.* for expediting the completion of the works before mentioned, nor certain sums of money due in respect of compensation and for extra cost, expense, and labour, nor for extra

* 85 works the particulars of which were mentioned * and specified in the bill; that under the circumstances and at the times in the bill stated H. M'Intosh had become entitled to the two several sums of 1000*l.* in the contract mentioned, making together the sum of 2000*l.*; that the total balance claimed by H. M'Intosh amounted to 17,193*l.* 7*s.* 2*d.*; that the agents of the company duly appointed and authorized for the purpose had investigated, measured, examined, and estimated all the works comprised or mentioned in the several accounts so delivered, and such agents had in all particulars admitted that the several and respective works and quantities of work as stated and charged for in the several accounts were therein correctly stated and had agreed to the same accordingly; that the company and their agents had disputed the accuracy of such several and respective accounts in respect only of the sums or some of the sums of money charged therein respectively; that frequent and ineffectual attempts both by H. M'Intosh and the plaintiffs as his executors had been made to obtain payment of the sums due in respect of the contract; that although the works executed by H. M'Intosh had been

wholly executed and completed, and were so far as the same were required to be by the terms of the contract kept in repair by H. M'Intosh to the entire satisfaction of I. K. Brunel as such principal engineer, yet he the said I. K. Brunel had refused and declined and still refused and declined, but without assigning any good and sufficient reason for so refusing or declining, to certify that such works had been executed and completed and kept in repair respectively to his satisfaction, and that in consequence thereof the plaintiffs had been and were unable to recover at law the amount of the moneys which were justly due to the estate of H. M'Intosh from the company on account of the contract and the works thereof; that in so refusing or declining to certify

* I. K. Brunel had been and was acting under the authority * 86 and by the direction of the directors of the company, and that he had in fact been required by the board of directors or by the secretary of the company to abstain from issuing and to withhold any further or other certificate of any sum or amount being due to H. M'Intosh in respect of the works therein mentioned or any of them, or of the satisfactory execution or final completion or of the repair of the said works or any of them, although the whole of the said works had been so satisfactorily executed and finally and duly completed, and so far as it was incumbent on H. M'Intosh to keep the same or any of them in repair had been duly kept by him in repair; that the plaintiffs had no means of compelling the said I. K. Brunel to issue any such certificates; that the want of such certificates, and especially of the certificate of completion and the certificate of repair, prevented the plaintiffs from recovering the amount due to the estate of H. M'Intosh in respect of the several works and matters at law; that the several transactions in the bill mentioned and the several accounts relating thereto were so complicated, intricate, and voluminous that the same could not properly be dealt with or disposed of in an action at law, and that if a general account were to be taken in respect of all the works therein mentioned and of what was due on account thereof the number of items to be investigated would exceed five thousand; that the principal engineer and assistant resident engineer of the company or one of them examined and measured, or professed to measure, all such works respectively, and made notes, memoranda, and minutes relating thereto, and that verbal and written communications passed between the assistant resident engineer and the

principal engineer respecting the same, and that the assistant resident engineer was bound to make and did make daily * 87 * and weekly reports relating thereto to the principal engineer, who approved of and sanctioned the same, and made reports on the subject thereof to the directors and secretary and solicitors of the company, and issued or made certain memoranda and notes with a view to issuing certificates of the same or of some parts or part thereof, and that during the progress of the several works the principal engineer was in the habit from time to time of making and furnishing reports to the company and to the chairman and other directors thereof, and to the secretary of the company, by whom the same were communicated to the chairman and other directors, of and respecting the several works and parts of works as well specified as extra additional and altered works which had been executed and were in the course of execution and were about to be executed respectively, and which were required for the purposes of the line of railway so comprised in the contract and the construction thereof; and which he the said principal engineer purposed or designed to have executed for the purposes therein mentioned; that the works and quantities of work appearing to be executed and completed by H. M'Intosh under the contract did not show all the works or the full quantities of work which were in fact executed and completed by him nor the full amount due to the plaintiffs in respect thereof, inasmuch as in consequence of alterations, changes, and additions in and to the original plans and designs of the respective works which the company by their principal engineer from time to time made and which were so made in the course of the execution of the works, H. M'Intosh was upon many occasions and in many instances required and ordered by and on behalf of the company and particularly by the principal engineer to remove, and that he did accordingly remove and pull down works which had been duly and properly executed and * 88 * completed by him according to the contract, and that he was required and duly ordered to substitute and that he did accordingly substitute for the same other works for carrying into effect such alterations, changes, and additions; that the said several works were after the completion thereof examined and measured, and the quantities thereof agreed to by and on behalf of the company with H. M'Intosh and agents on his behalf; that the agents of the company who so examined, measured, and agreed

to the several works comprised in the contract and which were so executed by H. M'Intosh made notes, minutes, memoranda, and calculations of and respecting the same, and made reports and communications relating thereto to the chairman and other directors of the company, and to the secretary and principal engineer of the company, all which were now in the possession of the defendants; that at the time when H. M'Intosh entered into and executed the contract, and from that time to the period of his death, H. M'Intosh believed that I. K. Brunel was merely the principal engineer or servant and agent of the company, and that it was not until after the whole of the works had been completed, and not until after the decease of H. M'Intosh, that it was discovered that I. K. Brunel was an original subscriber to and member of the company, and that he did at the time of the formation of the company hold and had ever since held on his own account and for his own use and benefit many shares in the company, and that he (I. K. Brunel) had a direct interest in favour of the company and in withholding the certificates of completion and of repair; that the large discretionary powers given to I. K. Brunel by the contract were given to him on the assumption on the part of H. M'Intosh that he had no interest in the matters in respect of which such discretionary powers might be required to be exercised; that under the circumstances in the bill stated such * certificates of comple- * 89
tion and repair ought respectively to be dispensed with, inas-
much as I. K. Brunel was not competent by reason of his personal interest to exercise the discretionary powers according to the spirit and true intent and meaning of the contract.

The bill prayed a declaration that the withholding of the certificates was a fraud upon H. M'Intosh and upon the contract, and that the plaintiffs as the executors of H. M'Intosh were entitled to receive and be paid all such sums of money as they would have been entitled to demand if such certificates had been duly and properly granted and issued, and that they were entitled to charge the company for and in respect of all the extra additional and altered works mentioned in the accounts delivered by H. M'Intosh; and that the company might be decreed to pay to the plaintiffs the amounts remaining due upon the foot of the said accounts together with interest; or that an account might be taken of all and every the works which had been executed by H. M'Intosh under the contract, either as specified or as extra additional or altered works

or otherwise, together with the several prices which ought to have been paid or allowed to H. M'Intosh in respect of all such works in accordance with the terms of the contract or otherwise, and also an account of all moneys paid to H. M'Intosh in respect of such works or any of them, and that in taking such account rests might be made and balances stated at the expiration of the first and every succeeding fourteen days from the commencement and during the continuance of the works, and that interest might be computed thereon, and that in such account the estate of H. M'Intosh might also be credited with the several sums of 2000*l.* and 2500*l.* from the respective periods at which the same or any portion thereof ought to have been paid in accordance

* 90 * with the terms of the agreement of May, 1837, together with interest in respect of the same respectively or any portion thereof from the periods at which they respectively became due, and that in taking the said account fair and reasonable allowance and compensation might also be made for all losses and damage occasioned to H. M'Intosh in the execution of the works by means of the neglect, delays, and defaults on the part of the company, and for or in respect of interest on such of the capital of H. M'Intosh as was thereby for the time being left unemployed or rendered unproductive, the plaintiffs submitting and thereby offering to allow in account all such moneys as had already been paid to H. M'Intosh or to his order or for his use in respect of the works or any of them, and all deductions if any which ought, under the provisions of the contract and in the opinion of the Court, to be made in respect of such portions if any of the specified works as were afterwards diminished in expense by the alterations ordered by the defendants; and that the company might be decreed to pay to the plaintiffs the balance which upon taking the said account should be found due to them; and that all necessary and proper directions for these purposes might be given.

Mr. Bethell, Mr. Bacon, and Mr. Stevens, in support of the demurrer, referred to *Ranger v. The Great Western Railway Company*, (a) and went in detail through a great portion of the bill in the present case, in order to show that the plaintiffs raised only a legal claim, and that no grounds were stated for the inter-

(a) 1 Railway Cases, 1.

ference of a Court of Equity. In particular they contended, that, according to the statements in the bill in reference to the withholding the certificates, the plaintiffs if entitled to any remedy at all had a right of action at law against * the company: * 91 *Kirk v. The Guardians of the Bromley Union*, (a) *Heath v. Chadwick*, (b) *Pim v. Wilson*, (c) *Jackson v. The North Wales Railway Company*, (d) *Ambrose v. The Dunmow Union*; (e) that the want of the certificates would not prevent the plaintiffs from bringing their action on the covenant, the rule being that where a condition precedent becomes impossible, it is discharged: *Hotham v. The East India Company*, (g) *Holme v. Guppy*, (h) *West v. Blakeway*, (i) *Doughty v. Neal*, (k) Com. Dig. Condition L., (6) 1 Bacon's Ab. Condition; (Q) that Brunel was only a servant of the company, and that under these circumstances it was impossible to make out a case of collusion and fraud between him and the company. With regard to the accounts, they distinguished the present case from the case of accounts between principal and agent, and between parties standing towards each other in a fiduciary character; and also insisted that the whole tenor of the bill negatived the allegation of the accounts being long and complex, as it showed distinctly that the accounts were agreed to, and that there were only a few items in dispute between the parties. *The Taff Vale Railway Company v. Nixon*, (l) *North Eastern Railway Company v. Martin*, (m) *Foley v. Hill*. (n)

Sir F. Kelly, Mr. J. Russell, Mr. Lloyd, and Mr. Hetherington, contra, contended, with regard to all those portions of the plaintiffs' claim which related to the certificates, that the refusal to grant these certificates * rendered it impossible for the * 92 plaintiffs to obtain redress at common law; that even supposing a Court of Law could deal with the case, the relief would be much less complete and satisfactory than what could be obtained in equity; that by the terms of the contract Brunel was constituted an arbitrator or judge, and as such was bound to have determined

(a) 2 Phil. 640.

(b) *Ib.* 649.(c) *Ib.* 653.

(d) Before the Lord Chancellor, December 13, 1848.

(e) 9 Beav. 508.

(k) 1 Saunders, 215, 6th ed.

(g) 1 T. R. 638.

(l) 1 H. L. 111.

(h) 3 M. & W. 387.

(m) 2 Phil. 758.

(i) 2 M. & Gr. 729.

(n) 1 Phil. 399.

all questions between the parties which were referred to him by the contract, and to have granted the certificates accordingly; that his refusal to do so, which arose as he alleged from the orders of the company, one of the parties to the contract, prevented the plaintiffs proceeding at law on the covenant; that the covenant by the company, being to pay what Brunel should certify to be due, could not be enforced until the certificates were granted; that although it was true, that if a condition precedent becomes impossible by means of a wrongful act the condition is gone, yet that this was confined to cases where the act affected by the condition was ascertained, for instance, if the company had covenanted to pay 20,000*l.* on the execution of certain works and on the certificate of A. B., if in this case a plaintiff could show that he had done the works, but that the certificate was wrongfully withheld, he might recover at law; that this did not, however, apply to the present case, where it was necessary that the precedent condition should be complied with before the covenant could apply, there not being, until the certificate was granted, any sum fixed to be recovered under the covenant; that no authority could be produced to support an action on the covenant under such circumstances; that supposing, however, an action for damages might be maintained, the amount of such damages must be ascertained by taking the whole of the accounts, for doing which the proceedings at law were less adapted than those in equity; that the refusal

* 98 * to grant the certificates was, under the circumstances alleged, a fraud, and as such entitled the plaintiffs to relief in equity; that the bill might also be sustained on the necessity which existed for the plaintiffs to have discovery from the defendants, which, although not absolutely giving them also a right to relief, was a material circumstance to be considered on a question of jurisdiction in a case like the present: *Mackenzie v. Johnston*, (a) *Pearce v. Creswick*; (b) that in respect of some of the items of the plaintiffs' claim there was no remedy at law, as for instance the claim for the premium or bonus of 2500*l.* on account of accelerating the works. They submitted, on the whole, that there was no part of the plaintiffs' case which did not fall within the jurisdiction of a Court of Equity; that as to some parts it was clear there was no legal remedy, and that as to others the legal

(a) 4 Madd. 373.

(b) 2 Hare, 286.

remedy was doubtful, and if it existed at all was unsatisfactory. They referred to *Pulleney v. Warren*; (a) and distinguished the present case from *Ambrose v. The Dunmow Union*, (b) and *Kirk v. The Guardians of the Bromley Union*. (c)

Mr Bethell, in reply. — Brunel was the agent of the company: he was not an arbitrator, nor was he intended by the contract to act as such; but even if this were so, his refusal to act would not confer an equity on the plaintiffs.

June 4.

THE LORD CHANCELLOR delivered out to the parties the following judgment previously to resigning the great seal.

* I have examined with great care the statements in the * 94 very voluminous bill in this case, and have come to the conclusion that the Vice-Chancellor KNIGHT BRUCE's judgment is correct; and, in affirming it, I do not think that any of the decisions upon similar subjects are in the least disturbed.

It will probably be extremely difficult for a Court of Equity to do justice to the plaintiff, according to the case made by the bill; but there does not appear to be any possibility of a Court of Law doing so. What might be the effect of such a state of things if this impossibility had arisen from the act or conduct of the plaintiff, it is not necessary to consider, because it is, I think, sufficiently stated and shown that it not only exists in this case, but that it has arisen from the conduct of the defendants, not adopted probably from any fraudulent intention or scheme, but now made the instrument of fraud if it should prevail to prevent the plaintiff from recovering payment of what is justly due to him.

The subject-matters upon which the plaintiff seeks the assistance of equity are various; but in most of them the same ground exists; and as it is sufficient for the present purpose to see that a case is made for some relief, I purpose confining myself to that point which is common to many of the subject-matters of the bill, and as to which the facts stated, if true, are I think sufficient to entitle the plaintiff to the assistance of this Court.

It is true that the specification and contract constitute a relationship between the plaintiff and the defendants, which, if correctly

(a) 6 Ves. 72.

(b) 9 Beav. 508.

(c) 2 Phil. 640.

acted upon, would have given to the plaintiff a legal right,
 * 95 and a legal right * only, to the benefits he claimed by this bill; but if the facts stated in the bill are such as, if true, deprive the plaintiff of the means of enforcing such legal right, such facts having arisen from the conduct of the defendants, or of their agent so recognized by the specification and contract, and now used for the fraudulent purpose of defeating the plaintiff's claim altogether, the defendants cannot resist the plaintiff's claim in equity upon the ground that his remedy is only at law; nor is it any answer to show that, if the plaintiff cannot get at law what he contracted for, he may obtain compensation in damages. It is no answer to a bill for specific performance, that the plaintiff may bring an action for damage for a breach of the contract, or in a proper case of a bill for discovery of specific chattels, that damages may be recovered in trover: the language of pleading is not that the plaintiff has no remedy, but no adequate remedy save in a Court of Equity.¹ It is therefore no answer, in the present case, for the defendants to urge that if they, or their agent, have been neglectful of what they undertook to do, by which the plaintiff has suffered, they may be liable in damages to the plaintiff. He contracted for a specific thing, and is not bound to take that or something in lieu of it, if such other thing be not what this Court considers as a fair equivalent. I do not therefore consider that any answer is given to the plaintiff's right to file a bill in this Court, by showing that the ground upon which he seeks his right so to do, namely, the being barred of his legal remedy by the conduct of the defendants, may subject them to damages at law.

It was, indeed, urged that the plaintiff's remedy at law was not affected by the facts alleged in the bill, because it was contended that a condition precedent the performance of which was
 * 96 rendered impossible by the conduct * of the defendants, could not affect the plaintiff's right, upon the authority of *Hotham v. The East India Company*; (a) but the present is not a contract dependent upon a condition precedent, but the matter to be performed, and the performance of which has been prevented by the conduct of the defendants, is part of and of the essence of

(a) 1 T. R. 638.

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 550, 551 and cases in notes; Story Eq. Pl. § 473; 1 Story Eq. Jur. §§ 76, 80; *May v. Parker*, 12 Pick. 34; *Clark v. Flint*, 22 Pick. 231; *Jones v. Boston Mill Corporation*, 4 Pick. 507, 511, 512.

the contract itself, and without the performance of which it is provided that no right under the contract shall arise. The case made by the bill in this respect varies according to the facts, but the principle is included in all; extra work for instance, the payment of which was to be regulated by periodical admeasurements and a fixed rate of charge, cannot now be so regulated, being covered and concealed by other works made under the directions of the agent of the defendants. The contract, therefore, though capable of being performed after a due investigation, cannot be the subject of an action upon the terms of it. Similar observations apply as to other parts of the case, such as the works not being completed within the prescribed time, and the causes which led to that omission.

It appears to me, therefore, that this is clearly a case in which the plaintiff cannot obtain what he is entitled to at law; and that his inability to do so has arisen from the acts of the defendants, or their agent; and whether such acts arose originally from any fraudulent motive or not, I think that to use them for the purpose of defeating the plaintiff's remedy would constitute a fraud which this Court will not permit the defendants to avail themselves of; and that they are, therefore, precluded, according to the statements in the bill, from raising the objections they rely upon to the * plaintiff's equity; and that there is sufficient allegation of that of which the fraud consists. * 97

The demurrer was therefore, I think, properly overruled; and this appeal must be dismissed with costs.

SERGROVE v. MAYHEW.

1850. January 26.

A plea by one of two defendants of the insolvency of the other, held to be good, notwithstanding the insolvency occurred after the filing of the bill.

Plea allowed to be amended by substituting the word "suit" for the word "bill."

THIS was an appeal from an order of the Vice-Chancellor of England, dated the 10th November, 1849, overruling the plea put in to the plaintiffs' bill by Alfred Mayhew, one of the defendants.

On the 21st February, 1849, John Sergrove and Sarah Ellen, his wife, filed their bill against Alfred Mayhew, Thomas Andrew Fitzgerald Reynolds, and Robert Southee, praying that Robert Southee might, upon being served with a copy of the bill, be bound by the proceedings in the suit, and that an account might be taken of what was due to A. Mayhew and T. A. F. Reynolds for principal and interest in respect of a certain indenture of the 20th May, 1847, made between the plaintiffs of the one part and the said A. Mayhew and T. A. F. Reynolds, then carrying on business as attorneys and solicitors in copartnership, of the other part, and that upon payment of the amount found due, by the plaintiffs, or by R. Southee, out of certain funds in his hands, the indenture of the 20th May, 1847, might be delivered up.

To this bill the defendant A. Mayhew put in a plea, stating that on the 17th March, 1849, T. A. F. Reynolds presented his
 * 98 petition to the Court for the relief * of insolvent debtors in England; that by an order made on the 17th March, 1849, Samuel Sturgis, the provisional assignee of the Court, was appointed official assignee of the estate and effects of the defendant T. A. F. Reynolds; that all the estate and effects of the defendant T. A. F. Reynolds were then vested in S. Sturgis; and that S. Sturgis ought to be made a party to the bill.

The Vice-Chancellor of England having overruled this plea as above stated, the defendant A. Mayhew now appealed to the Lord Chancellor.

Mr. Rolt and *Mr. Glasse*, for the defendant A. Mayhew. — The defendant cannot be bound to put in an answer in the present suit, which as it now stands is imperfect. The same principle applies to this case as to that of *Turner v. Robinson*, (a) where a defendant pleaded his own bankruptcy. From *Tarleton v. Hornby* (b) it appears that a defendant cannot be called on to answer a defective bill; that is, a bill upon which the equity between the parties cannot be determined. The plea in question acts as a bar to the suit.

Mr. Malins and *Mr. Chichester*, in support of the bill. — We do not deny the general principle, that a defendant may plead the plaintiff's disqualification to sue, or that he may plead his own incapacity to answer; but neither of these cases applies to the

(a) 1 S. & S. 3.

(b) 1 Y. & C. 333.

present. The defendant does not plead any disqualification of his own, and his plea merely comes to this, that the plaintiffs have not filed a supplemental bill; but for doing this no necessity is shown. There was no defect in the suit originally; and if the plaintiffs neglect to take the proper steps for rectifying a subsequent defect, their suit will be necessarily * dismissed at * 99 the hearing. There is no reason, however, on this account why the defendant should not now answer.

Without calling for a reply,

THE LORD CHANCELLOR.—The plea in this case raises the question of the absence of a proper party to the suit. If such a defect appears on the face of the bill, the objection must be taken by demurrer; but if it does not so appear, the defendant may bring it forward by plea. Now, here there was no defect of parties on the face of the bill, and it is not disputed that, if the event raising the question had occurred prior to the filing of the bill, the plea would have been proper. It is said, however, that the plea is not proper, because the event has occurred since the filing of the bill; but in cases where a plaintiff has released after bill filed, the objection has been held to be rightly taken by plea. The same reason must apply to the present case. Here is a plea showing a defect which prevents the suit going on. A plea of this sort was allowed in *Turner v. Robinson*, (a) and I see no reason why it should not be allowed here.¹

An objection has been raised to the form of the plea, which asserts that the assignee should be a party to the bill, instead of asserting that he should be a party to the suit. This appears to me a trifling matter, and the defendant may have liberty to amend his plea in this respect.

The order will therefore be to discharge the Vice-Chancellor's order, with liberty to the defendant to * amend his * 100 plea by substituting the word "suit" for the word "bill;" and upon the plea being amended, to allow the plea, with liberty for the plaintiffs to file a supplemental bill.²

(a) 1 S. & S. 3.

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 63, 158, 606, 632; *Lane v. Smith*, 14 Beav. 49; *Jones v. Binns*, 10 Jur. N. S. 119; 12 W. R. 329, M. R.; 33 Beav. 362; *Campbell v. Joyce*, L. R. 2 Eq. 377, V. C. W.; *Pepper v. Hensell*, 13 W. R. 962.

² See 1 Dan. Ch. Pr. (4th Am. ed.) 703.

HEATHCOTE v. THE NORTH STAFFORDSHIRE RAILWAY COMPANY.

1850. February 7, 8. June.

Although the Court will, in a proper case, exercise its jurisdiction by injunction touching proceedings in Parliament for a private bill or a bill respecting property, yet it has no power to interfere to deprive a party of the right of applying to Parliament for a special law to supersede the rules of property by which he finds himself bound, whether arising from contract or otherwise.¹

A party agreed with a railway company to withdraw his opposition to their bill in Parliament in consideration of their completing their line of railway in a particular manner. The company subsequently found themselves unable to carry their contract into execution, and gave notice of their intention to apply to Parliament for an Act to authorize them to abandon their scheme. The Lord Chancellor dissolved an injunction, granted by the Vice-Chancellor of England at the suit of the party with whom the company had contracted, restraining the company from making this application.

THIS was a motion on behalf of the company to discharge an injunction granted by the Vice-Chancellor of England, on the 22d January, 1850, whereby the company were restrained from presenting any petition and from making or prosecuting any application to Parliament for obtaining an Act to authorize them to abandon or relinquish the Silverdale and Apedale Branch Railways or either of them, or to authorize any thing whatever to be done or omitted to be done by the company inconsistent with or repugnant to the covenant on the part of the company contained in the indenture of the 10th October, 1846, in the pleadings mentioned, and from giving any notice or taking any proceedings required by the standing orders of either House of Parliament to warrant the introduction into or the progress through Parliament of any such Act.

*101 *The original bill in this case was filed on the 2d July, 1849, by Richard Edensor Heathcote against the defendants, the North Staffordshire Railway Company, and was amended on the 6th December, 1849.

The bill as amended stated, that by an Act passed in the 9 & 10 Vict. the North Staffordshire Railway Company were authorized to construct a branch railway from or out of their main line at or

¹ See *Steele v. N. M. Railway Co.*, L. R. 2 Ch. Ap. 237; *Anstruther v. East Fife Railway*, 1 McQueen, 98; *post*, 109, note (2).

near Stoke-upon-Trent in the county of Stafford, to Newcastle-under-Lyne and Silverdale in the same county, called the Silverdale Branch Railway, and for that purpose to take and use among other lands part of a certain canal called the Gresley Canal belonging to the plaintiff; that the plaintiff was an opponent to the Act in Parliament, but withdrew his opposition in consideration of an agreement entered into between him and the company; that this agreement was afterwards embodied in an indenture bearing date the 10th October, 1846, and made and duly executed between and by the company of the one part and the plaintiff of the other part, whereby the plaintiff covenanted to assist the company in obtaining an Act of Parliament authorizing the formation of a branch railway from the Silverdale Branch Railway to certain furnaces at Apedale in the county of Stafford belonging to the plaintiff, called the Apedale Branch Railway, and in the event (which happened) of the company not deeming it advisable to make use of the bed of the Gresley Canal as the site of the Apedale Branch Railway, within one week from the opening to the public of the Apedale Branch Railway to convey and assure to the company so much of the canal as was therein specified, the company covenanting to apply at the then next session of Parliament, and to use their utmost efforts to obtain an Act empowering and requiring the *company to construct the Apedale Branch *102 Railway, and with all practicable expedition after such Act should be obtained to complete and open for use the Apedale Branch Railway; that in pursuance of the provisions of such indenture, the company did in the then next session of Parliament apply for and obtain such Act, which authorized and required the company to construct the Apedale Branch Railway by a line diverging out of the Silverdale Branch Railway at a considerable distance from the Gresley Canal, and running throughout at a greater distance therefrom than the limits of deviation allowed to the company by the Lands Clauses Consolidation Act, 1845; that the plaintiff had always been ready and willing to perform the covenants on his part contained in the indenture, but that the company had not taken any steps towards making the Apedale Branch Railway, nor, until then quite lately, the Silverdale Branch Railway; that in fact neither of the said branch railways had then been begun, and that the company had determined, or had it in contemplation, not to make the Apedale Branch Railway at all,

and to make only a portion of the Silverdale Branch Railway; that not only the construction of the Apedale Branch Railway, but also the extension of the Silverdale Branch Railway to the furthest point authorized by the before-mentioned Acts or either of them, was most important to the interests of the plaintiff; that it was at the date of the indenture fully understood and agreed between the plaintiff and the company that the Silverdale Branch Railway should be constructed, and that the construction thereof as well as of the Apedale Branch Railway formed part of the consideration which induced the plaintiff to execute the same, and to withdraw his opposition to the Act authorizing the construction of the company's main line.

* 103 * The bill prayed in effect a declaration that no part of the hereditaments and premises of the plaintiff comprised in the indenture of the 10th October, 1846, was after the execution of that indenture subject to be taken or purchased by the company under the compulsory powers contained in the Lands Clauses Consolidation Act, 1845, and that all powers of the company under that Act for the compulsory purchase of lands and hereditaments required for the Silverdale Branch expired on the 26th June, 1849, and thereupon ceased and were not exercisable, and that certain proceedings therein mentioned taken by the company under the 85th section of the Lands Clauses Consolidation Act, 1845, were or had become irregular and of no effect; and that the company might be decreed specifically to perform the agreement on their part contained in the indenture, and with all practicable expedition to complete and open for use the Apedale Branch Railway and also the Silverdale Branch Railway, to the full extent authorized by the before-stated Acts or either of them, the plaintiff being ready and willing to perform the agreements contained in the indenture on his part and to convey and assure according to the provisions of such indenture to the company their successors and assigns, at their expense, so much of the canal with its appurtenances thereto belonging as was comprised in such indenture, and to treat with the company for any other property of the plaintiff which might be required by the company for the *bonâ fide* purpose of constructing the Apedale Branch Railway or the Silverdale Branch Railway to the full extent aforesaid; and that the company might in the mean time be restrained from issuing any warrant to the sheriff of the county of Stafford, requiring him to summon a jury for the

purpose of determining the amount of compensation to be paid to the plaintiff for the purchase * of the hereditaments * 104 and premises comprised in the notice therein mentioned of the company, and from exercising any other power, or doing any act for the purpose of compulsorily taking possession of the hereditaments and premises or purchasing or acquiring any interest in the same, and from entering upon or continuing in possession of such hereditaments and premises or any part thereof, and from digging or excavating or doing or executing any railway or other work in or upon such lands and hereditaments or any part thereof, and from obstructing or in any way interfering with the navigation of such canal or the free use and enjoyment thereof by the plaintiff; and that the company might be ordered to pay to the plaintiff the costs of the suit.

A supplemental bill was filed on the 19th December, 1849, which, after setting out the original bill, stated among other things, that, since the filing of the original bill, the company determined and they intended to apply to Parliament at the next ensuing session for an Act to authorize the company to abandon the formation of the Silverdale and Apedale Branch Railways, and advertise such intention in the public newspapers, and served divers land-owners whose property was authorized by such Acts or one of them to be taken for the purposes of such branch railways or one of them with a notice signed by the solicitors to the company, and expressed in the words and figures or to the purport and effect following:—

“ No. 136. North Staffordshire Railway (abandonment of branches to Newcastle-under-Lyne, Silverdale, and the Apedale ironworks Amendment Acts), 47 Parliament Street, London, 30th November, 1849: Sir, — We beg to inform you that application is intended to be * made to Parliament in the ensuing * 105 session for an Act under the above name or title to authorize the North Staffordshire Railway Company to relinquish the formation of the following branch railways, namely, first, the branch railway authorized by the ‘ North Staffordshire Railway (Pottery Line) Act, 1846,’ and ‘ The North Staffordshire Railway Act, 1847,’ to be made from or out of the Pottery Line of the North Staffordshire Railway, at or near the town of Stoke-upon-Trent in the county of Stafford to Newcastle-under-Lyne and Silverdale in said county; secondly, the branch railway authorized

by 'The North Staffordshire Railway Act, 1847,' to be made from the first-mentioned branch railway in the said parish of Newcastle-under-Lyne to Apedale ironworks in the parish of Wolstanton in the same county; and that such of your lands or buildings as were authorized by said Acts or either of them to be taken compulsorily for the purposes of said branch railways or either of them, will not be required for such purposes if said intended Act should be passed into a law. We shall feel obliged by your informing us at your earliest convenience, whether you assent to or dissent from the proposed measure, or whether you are neuter in respect thereof. We are, sir, your obedient servants, Burchell & Parson, solicitors for the bill."

The supplemental bill then charged that the application by the company for this Act would be a breach of the agreement between the company and the plaintiff, and inconsistent with and repugnant to the covenant on the part of the company contained in the indenture of the 10th October, 1846, and was in fact intended to be made by the company for the purpose of defeating the rights of the plaintiff under the said indenture. The prayer was in the terms of the injunction granted by the Vice-Chancellor.

* 106 **Mr. Bethell, Mr. Malins, and Mr. Bovill*, in support of the appeal motion, and referring to the facts stated by the defendants in their answer and further answer, contended that the indenture of the 10th October, 1846, was obtained by misrepresentation of the plaintiff as to the ownership of the canal, he not being, under the circumstances appearing in the answers, the owner of the canal within the meaning of the recital contained in the indenture. They contended further that the injunction asked was incidental and auxiliary to the relief prayed, and that if there was an infirmity in the agreement on the part of the plaintiff so that it could not be performed *in toto*, the Court would not by injunction compel the defendants to perform their part of it. *Dietrichsen v. Cabburn*. (a) They submitted, that although an individual might be restrained from applying to Parliament in opposition to a bill, yet that it was a very different thing to restrain a company which had got an Act from applying again for the reconsideration of that Act; that the only *locus standi* of a private individual as an op-

(a) 2 Phil. 52.

ponent to a bill was an alleged injury to his private right, out of which it was clear a man might contract himself: *The Stockton and Hartlepool Railway Company v. The Leeds and Thirsk and the Clarence Railway Companies*; (a) but that the case of a company rested upon grounds of public utility.

Mr. R. Palmer and Mr. Amphlett, contra.—The plaintiff is only asking for an injunction against that which is a clear violation of the agreement. There was no misrepresentation by the plaintiff in reference to the indenture, for the solicitor of the company had full knowledge of the state of the title. As to the agreement * being one which cannot be performed by the plaintiff * 107 *in toto*, and therefore one of which the Court will not by injunction compel the defendants to perform their part, the case of *Dietrichsen v. Cabburn* (b) is no authority for such a position but for the reverse, for there your Lordship observes: “The equitable jurisdiction to restrain by injunction an act which the defendant by contract or duty was bound to abstain from, cannot be confined to cases in which the Court has jurisdiction over the acts of the plaintiff; for if that were so, it could not interfere to restrain the violation of contracts by tenants, or of duty by agents.” It is clear, that a man may be restrained from doing acts or infringing covenants which are not binding at law. *Tulk v. Moxhay*, (c) *Storer v. Great Western Railway Company*. (d) There is no such distinction as that a party may be restrained from opposing, but not from promoting, an Act of Parliament; for if so, he might first let the bill pass, and then promote an act for its repeal. The proceedings taken by the company are inconsistent with the agreement into which they have entered, and, their compulsory powers having expired, the injunction is right in restraining them from proceeding under the 85th section of the Lands Clauses Consolidation Act. *Brocklebank v. The Whitehaven Junction Railway Company*. (e) It is no ground for refusing the relief asked, that the company, if made to perform their part of the agreement, would require fresh parliamentary powers. *The Great Western Railway Company v. The Birmingham and Oxford Junction Railway Company*. (g) The Court will make every effort to decree specific performance rather

(a) 2 Phil. 666.

(d) 2 Y. & C. C. C. 48.

(b) 2 Phil. 52.

(e) 15 Sim. 632.

(c) 2 Phil. 774.

(g) 2 Phil. 597.

than leave the plaintiff to his remedy at law. *Price v. Corporation of Penzance*. (a) [They referred * also to *Ware v. The Grand Junction Waterworks Company*, (b) *Cunliff v. The Manchester and Bolton Canal Company*. (c)]

Mr. Bethell, in reply. — The relief which the bill seeks is clearly beyond the powers of the Court, which cannot compel the defendants to make a railway. *Lane v. Newdigate*, (d) *Flint v. Brandon*. (e)

June.

THE LORD CHANCELLOR delivered out to the parties the following judgment previously to resigning the Great Seal.

The injunction granted by the Vice-Chancellor of England, and by this motion sought to be dissolved, in substance restrains the defendants from making any application to Parliament for obtaining any Act authorizing them to abandon or relinquish the Silverdale and Apedale Branch Railways, or either of them, or to authorize any thing whatever to be done or omitted to be done inconsistent with or repugnant to the covenant contained in an indenture of the 10th October, 1846. By this covenant the defendants agreed with the plaintiff that they would in the then next session of Parliament apply for and use their utmost endeavours to obtain a distinct and separate Act, empowering and requiring them to make and construct a branch line of railway commencing by a junction with the company's Silverdale branch from the North Staffordshire Railway Pottery line at or near to Newcastle-under-Lyne, and terminating at or near to the furnaces of Apedale, and that they would, with all practicable expedition after such

* 109 authority should have been obtained, complete * and open for use the said Apedale Branch Railway at their own expense in all things, and should for ever thereafter maintain the same at the like expense. It will be observed that the proposed Act was to authorize the making of the Apedale Branch: the authority for the Silverdale Branch had been obtained by an Act of the session of 1846; but the Apedale Branch was to run into, and so in part form one with, the Silverdale. In 1847, an Act for making the Apedale Branch was accordingly applied for and obtained,

(a) 4 Hare, 506.

(d) 10 Ves. 192.

(b) 2 Russ. & M. 470.

(e) 8 Ves. 159.

(c) *Ib.* 480 n.

authorizing but not otherwise requiring the company to make such branch ; but no part of it has ever been made. The supplemental bill states a notice dated 30th November, 1849, on the part of the defendants, sufficient for the purpose of an injunction to show an intention of applying to Parliament for an Act to authorize them to relinquish the formation of the Silverdale and Apedale Branches ; and the question is, first, whether this Court has jurisdiction to interfere by injunction to prevent such application to Parliament ; and secondly, if it has, whether a proper case is made for the purpose.

Upon the first it has been suggested, that this Court could not interfere without infringing upon the privileges of Parliament : so the courts of common law thought at one time ; and there is as much foundation for the one as for the other supposition. In both cases, this Court acts upon the person, and not upon the jurisdiction.¹ In a proper case, therefore, I have said here and elsewhere, that I should not hesitate to exercise the jurisdiction of this Court by injunction, touching proceedings in Parliament for a private bill or a bill respecting property ; but what would be a proper case for that purpose it may be very difficult to conceive.² The case of Parliament differs widely from that of the courts of common law : the province of the latter * is to en- * 110 force legal rights, and the object of the injunction is to prevent an inequitable use of such legal right ; but the ordinary province of Parliament in such bills is to abrogate existing rights, and

¹ Per LORD CHELMSFORD L. C. in *Steele v. N. M. Railway Co.*, L. R. 2 Ch. Ap. 240.

² In *Steele v. N. M. Railway Co.*, L. R., 2 Ch. Ap. 237, 243, LORD CHELMSFORD L. C. said : " We have been told by judges of great eminence that the Court has power to interfere by injunction to prevent an application to Parliament ; but they all decline to define the occasion which would justify such an interference, and even express an opinion as to the difficulty of conceiving a case in which any one could be so restrained." He also in same case says : " No case has been produced to me in which the Court has ever prevented an application to Parliament for an Act." See *Lancaster and Carlisle Railway Co. v. N. W. Railway Co.*, 2 K. & J. 293, 308, 309 ; *Bill v. The Sierra Nevada Lake Water and Mining Co.*, 1 De G., F. & J. 177 ; 6 Jur. N. S. 184 ; 2 Dan. Ch. Pr. (4th Am. ed.) 1620, and note (1). It has been held, in New Jersey, that the Court of Chancery has no power, by injunction, to restrain any citizen from petitioning either branch of the legislature upon any subject of legislation in which he is interested. Such restraint would be an unauthorized abridgment of the political rights of the party enjoined. *Story v. The Jersey City and Bergen Point Plank Road Company*, 1 C. E. Green, 13.

to create new rights. To hold, therefore, that no application should be made to Parliament, because the object of the application was to interfere with some right or interest of some other party, would be in effect to hold that this Court should by its injunction deprive the subject of the benefit of parliamentary interference in all such cases. In many settlements there is a want of some power essential to the proper management of the property; and Parliament is in the habit of exercising its discretion in supplying the defect: but if any party interested could obtain an injunction against such proceeding upon this ground, that what was proposed would interfere with his estate and interest, Parliament would have no opportunity of exercising its discretion. So in railway Acts, every owner in the line of the intended railway has an interest in the exercise of the powers asked: the promoters of the bill ask for powers to interfere with their interest, and to take land which the owners may be most anxious to retain; but it has never been suggested that the Court could interfere by injunction to prevent the promoters from prosecuting such bill. The injunction, therefore, cannot be granted upon the ground that the Act applied for would interfere with existing rights, it being the very object of it to do so. What difference then can it make, whether such pre-existing right exist by the tenure of property or by virtue of contracts? In both cases Parliament has the same power of destroying, altering, or affecting such pre-existing rights, providing, as it always does or intends to do, compensation to the party affected; and in

* 111 neither has this Court a right to interfere by injunction * to deprive the subject of the right of applying to Parliament for a special law to supersede the rules of property by which he finds himself bound, whether arising from contracts or otherwise.

It is also to be observed, that the contract which the plaintiff seeks to preserve is one which this Court cannot specifically perform: it cannot decree the company to make the two branches in question;¹ but they having obtained power to make them, and having covenanted to make and maintain the Apedale Branch in which the plaintiff has an interest, and neglecting or refusing to perform such covenant, may be liable at law for such neglect or refusal; and to enforce such liability is the whole of the right

¹ See *Reg. v. Dundalk and Enniskillen Railway*, 5 L. T. N. S. 25; *State v. Hartford and N. H. R.R.*, 29 Conn. 538; *Lind v. Isle of White Ferry Co.*, 7 L. T. N. S. 416.

the plaintiff can have under this covenant. But does that which the plaintiff alleges the defendants are seeking to obtain from Parliament interfere with such right? The object of the application to Parliament is to authorize the company to relinquish the formation of those two branches, and not to relieve them from liability to any contracts they may have entered into in contemplation of making them. Suppose they had agreed for the purchase of land in the line of the Apedale Branch. Relinquishing the formation of the line, they may still be liable to complete the purchase, and could the owner obtain an injunction to prevent the defendant obtaining an Act to authorize such relinquishment? It is well known that after companies have involved themselves in all the difficulties and liabilities incident to their undertakings, the aid of Parliament or of some authority derived from Parliament is necessary to extricate them; but this does not necessarily extend to protecting them against liability to contracts they may have entered into.¹ It is not alleged in the supplemental bill that such is intended to * be the object of the Act applied for; and if * 112 it were, it would only show that the plaintiff has an interest in the subject-matter of the petition to Parliament which would probably entitle him to be heard upon it. The covenant is a mere legal contract, which the Act asked for may prevent the defendant from performing, but that is all. If A. contract with B. to deliver goods at a certain time and place, will equity interfere to prevent A. from doing any thing which may or can prevent him from so delivering the goods?² If, indeed, A. had agreed to sell an estate to B., and then proposed to deal with the estate, so as to prevent him from performing his contract, equity would interfere, because in that case B. would by the contract have obtained an interest in the estate itself, which in the case of the goods he would not.

Independently, therefore, of the objection that the injunction restrains an application to Parliament for a purpose which the plaintiff has no right to control, there is, I think, a want of equity arising from the nature of the contract itself; and I am therefore of opinion that the injunction ought to be dissolved, and the motion before the Vice-Chancellor refused with costs.

¹ *Hawkes v. The Eastern Counties Railway Co.*, 1 De G., M. & G. 737; 8 C., 5 H. L. 331; *Simpson v. Lord Howden*, 1 Railway Cas. 326; 9 Cl. & Fin. 61; *Taylor v. The Chichester and Midhurst Railway Co.*, L. R. 2 Exch. 356.

² See *De Mattos v. Gibson*, 4 De G. & J. 298.

1850. February 8, 18. June 1.

The obligee of a bond having placed himself in such a position with regard to the principal debtor that he could not demand payment of the bond until a certain agreement entered into with third parties had been carried into effect: *Held*, that this was such a giving of time to the principal debtor as discharged a surety to the bond.²

THIS was an appeal by John Gilbert, one of the defendants in the cause, from the decision of Vice-Chancellor WIGRAM, allowing exceptions taken by the plaintiff to the Master's report dated the 3d August, 1848. The effect of the decision was to make John Gilbert liable for one-third of a sum of 1000*l.*, in respect of which he had become surety for William Gilbert to Thomas Cross, the testator in the cause.

The facts of the case are fully stated by the Lord Chancellor in his judgment, and will also be found reported in the 6th volume of Mr. Hare's Reports, p. 552. It will be seen by that report, that the question decided by his Honor was the liability of W. Gilbert to the testator's estate; and the argument of counsel before the Lord Chancellor was principally addressed to the same point.

Mr. Teed and *Mr. Hallett*, for J. Gilbert.

The Solicitor-General and *Mr. Glasse*, in support of the decision of the Vice-Chancellor.

Mr. J. Baily appeared for the defendant H. C. Sprigg, the widow and administratrix of the testator.

Mr. Teed, in reply.

All the cases mentioned by the Vice-Chancellor in his judgment were again referred to, and the following were also cited.

¹ S. C., 2 H. & T. 233; 6 Hare, 233.

² 3 Lead. Cas. in Eq. (3d Am. ed.), 529 [814] *et seq.*, 559 *et seq.*, and cases cited in note; 1 Story Eq. Jur. § 326; Chitty Contr. (10th Am. ed.) 581, 582, and cases in notes.

Cockshott v. Bennett, (a) *Eastabrook* * v. *Scott*, (b) *Ex parte* * 114
Sadler and Jackson, (c) *Britten v. Hughes*, (d) *Samuell v.*
Howarth, (e) *Mayhew v. Crickett*, (g) *Davey v. Prendergrass*, (h)
Clark v. Upton, (i) *Pickard v. Sears*, (k) *Gregg v. Wells*. (l)

June 1.

THE LORD CHANCELLOR delivered out to the parties the following judgment, previously to resigning the Great Seal.

This is one of those cases in which an unfortunate departure from the regular course has brought into discussion, and calls for a decision upon, a matter not in issue in the cause or capable of being disposed of by any adverse proceeding in it.

The object of the suit, and the purport of the decree, was to take the usual accounts of the estate of a testator, Thomas Cross, and as incidental thereto to inquire of what his personal estate consisted. The Master reported that it consisted, amongst other things, of a sum of 1000*l.* secured by a bond of William Gilbert, and of which the appellant John Gilbert and one Robert West Hyde were sureties, each as to one-third of the 1000*l.* John Gilbert happened to be a party to the cause in another character, but not as connected with this bond, and Robert West Hyde was not a party to the cause; and it is obvious that as sureties to the bond they would not have been proper parties to the suit, and that the Court had no jurisdiction to compel payment by them of any part of the 1000*l.* for which they might have become sureties.

It appears, however, by the Master's report of the 3d August, 1848, that the counsel for the appellant John * Gil- * 115 bert, one of the sureties, induced the Court to direct the Master to inquire whether the appellant was liable to pay any part of the 1000*l.* as surety for William Gilbert the obligor, without any undertaking on his part to pay what if any thing should be so due. The Master found that the appellant John Gilbert was not liable for any part of the 1000*l.*, and, in answer to another part of the decree, that it was not expedient that any proceedings should be taken for payment by William Gilbert or Robert West Hyde of the 1000*l.* This latter inquiry must have been ordered for the purpose

(a) 2 T. R. 763.

(b) 3 Ves. 456.

(c) 15 Ves. 52.

(d) 5 Bing. 460.

(e) 3 Mer. 272.

(g) 2 Swanst. 185.

(h) 5 B. & A. 187.

(i) 3 M. & Ryl. 89.

(k) 6 A. & E. 469.

(l) 10 A. & E. 90.

of enabling the Court the better to give directions for the administration of the estate, for although a report that nothing was due from the principal debtor would operate in favour of the surety, yet the principal might well remain liable, although the surety had been discharged, and the whole case, so far as it might affect the surety, was open upon the inquiry as to his liability. To this report the plaintiff took exceptions, including the findings both as to the principal and the surety; and the Court having allowed the exceptions, the effect was a decision that the surety was liable for that proportion of the debt for which he had undertaken; and, the surety John Gilbert having alone appealed from this decretal order, that is the only question before me; but the argument before Vice-Chancellor WIGRAM, and his Honor's judgment, and the argument before me, turned principally upon the liability of William Gilbert, the principal. If the Court had been of opinion that the principal had been discharged, it would not have been material to consider the peculiar case of the surety; but having come to a contrary conclusion, the question whether the circumstances amounted to a discharge of the surety would appear to have called for a

decision, because, if that were answered in the affirmative,

* 116 John Gilbert the exceptant * and appellant would not have had any interest in the other inquiry, and the exceptions raising the question as to his liability ought at all events to have been overruled. Although no practical result can arise from the finding either way in this cause, I do not, however, think that, after what has taken place, I ought for that reason to decline expressing my opinion upon that point.

From the Master's report and the evidence to which it refers, it appears that the testator having advanced 1000*l.* to this William Gilbert, to assist him in a partnership business, William Gilbert executed a bond to secure repayment of that sum, John Gilbert and Robert West Hyde becoming sureties, each for one-third of that sum. The partnership business having become insolvent, William Gilbert agreed with the creditors to pay a composition to them of eleven shillings in the pound upon their debts; but the property of the business being insufficient to pay such composition if the testator exacted payment of his 1000*l.* bond debt, he agreed not to require payment, but to give it up altogether, and to guarantee to the creditors the composition of eleven shillings in the pound. The Master found that the surety was discharged, the

transaction amounting to a giving of time to the principal, and in this opinion I concur.

The question really is, whether, under these circumstances, the testator could call upon William Gilbert, and compel him to pay the 1000*l*. He had joined in representing to the creditors that there was property equal to pay eleven shillings in the pound ; but that would not be so if he had required payment of his 1000*l*., and he therefore promised to relinquish it. Could he afterwards disappoint the expectations he had raised and falsify the promises he had made, by compelling payment of the 1000*l*. ? It is true that as he guaranteed the payment of the composition, the creditors, * though disappointed of receiving their composition from * 117 the property, might obtain it from the testator ; but under the arrangement they had the double security ; and it was for them to judge whether they would take the personal guarantee of the testator, in lieu of the actual produce of the estate. I think it clear that the testator could not have withdrawn himself from the arrangement to which he had become a party, and have demanded payment of his 1000*l*. before that arrangement had been carried into effect ; and consequently that William Gilbert, the principal debtor, having had time given to him by the obligee, that is to say, a new obligation entered into which protected him against payment of the debt, the surety was discharged. If the testator could have called upon John Gilbert to pay his proportion of the 1000*l*., he might have required repayment of it from William Gilbert, whereby the arrangement between William and the testator and the creditors would have been defeated.

This is the principle upon which cases of this kind depend ; and I think that the facts bring this case within it, and that the Master's finding that John Gilbert was not liable to pay any part of the 1000*l*. was correct, which was all that John Gilbert had, even under the irregular reference of 30th July, 1847, to do with the matter. The plaintiff, however, in his exceptions to the Master's report, controverts all the findings, both as to his own liability, and as to the liability of the principal debtor which in the view I have taken of this case is immaterial, which creates some difficulty as to the form of the order to be drawn up to give effect to my decision. It should however, I think, be to overrule the sixth exception (being the exception to the Master's finding as to the non-liability of John Gilbert) upon the merits, and all the other as immaterial between the plaintiff and John Gilbert.

* 118 * ADAMS v. THE LONDON AND BLACKWALL RAILWAY COMPANY.¹

1850. February 12, 13. July 4.

Although the compulsory taking of land under the provisions of railway Acts may, to a certain extent and for certain purposes, place the company and the land-owner in the relative position of purchaser and vendor, yet it does not follow that a Court of Equity will decree the specific performance of such sales.²

Whether in a case depending exclusively on a notice to take land given by a company under the provisions of the Lands Clauses Consolidation Act, 1845, the Court will interfere to compel the company to adopt the subsequent proceedings directed by the Act for giving compensation to the land-owner. *Quære?*

In a case where such a notice had been followed by a claim to compensation on the part of the land-owner, and a subsequent agreement between the parties, which claim and agreement were however ultimately abandoned and repudiated on both sides, the Court, allowing a demurrer to a bill filed by the land-owner, refused to interfere to compel the company, who were in possession of the land, to summon a jury, holding that in this case the notice *per se* did not give the Court jurisdiction, and that the rights of the parties were to be regulated by the provisions of the 68th and 85th sections of the Lands Clauses Consolidation Act, 1845.

The provisions of the 68th section of the above Act apply to the case of land taken under those of the 85th section.³

THIS was an appeal by the London and Blackwall Railway Company from an order of the Vice-Chancellor WIGRAM, overruling their demurrer to the plaintiffs' bill. The bill, which was filed by W. B. Adams and his partners, the lessees for a term of sixty-one years of certain premises which the London and Blackwall Railway Company were by their Acts empowered to purchase, contained statements to the following effect.

On the 19th July, 1847, the company, in pursuance of the provisions of their special Act and of the Lands Clauses Consolidation Act, 1845, served the plaintiffs with the following notice, to which a description of the property therein mentioned was annexed:—

“The London and Blackwall Railway Company. To Messrs.

¹ 2 H. & T. 285; 14 Jur. 679; 19 L. J. Ch. 557.

² See *Duke of Norfolk v. Tennant*, 9 Hare, 744.

³ *Armistead v. The North Staffordshire Railway Co.*, 16 Q. B. 526, 535.

Samuel Adams, William B. Adams, and William Alexander Adams, and the several other persons or person * (if * 119 any) interested in the lands or hereditaments hereinafter described. You are hereby requested to take notice that, under and by virtue of an Act of Parliament made and passed in the ninth year of the reign of her present Majesty Queen Victoria, entitled 'An Act for making a railway from the London and Blackwall Railway at Stepney to the Eastern Counties Railway,' the London and Blackwall Railway Company require to purchase or take for the purposes of the said Act all that piece or parcel of land or ground being part of a larger piece of land now or lately used as garden ground, and now or late in the occupation of you the said Samuel Adams, William B. Adams, and William Alexander Adams, situate and being in the parish of St. Mary, Stratford-le-Bow, in the county of Middlesex, as the said piece or parcel of land or ground so required to be taken is more particularly delineated and described in the plan hereunto annexed and therein coloured red, together with the road or way, and all fences, hedges, ditches, waters, and watercourses, rights, and appurtenances to the same piece or parcel of land or ground hereditaments and premises belonging or appertaining. And the said company do hereby demand of you the particulars of your estate and interests in the lands and hereditaments before mentioned, and of the claim made by you in respect thereof. And you are hereby required also to take notice that the said company are willing to treat for the purchase of the said lands and hereditaments, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works by the said Act of Parliament authorized to be made or executed. Dated this 19th day of July, 1847. John F. Kennell, Secretary. Office of the Company, The London and Blackwall Railway Office. Terminus, Fenchurch Street. —

N.B. You are requested to observe that by the Lands * Clauses * 120 Consolidation Act, 1845, § 21, it is thus enacted: 'If for twenty-one days after the service of such notice any such party shall fail to state the particulars of his claim in respect of any such land, or to treat with the promoters of the undertaking in respect thereof, or if such party and the promoters of the undertaking shall not agree as to the amount of the compensation to be paid by the promoters of the undertaking for the interest in such

lands belonging to such party, or which he is by this or the special Act enabled to sell, or for any damage that may be sustained by him by reason of the execution of the works, the amount of such compensation shall be settled in the manner hereafter provided for settling cases of disputed compensation.' — N. B. In order to assist you in preparing a statement of the particulars of your claim, a form is herewith sent which may be filled up and returned to the company at their office as above."

On the 9th August, 1847, the plaintiffs' solicitor, in conformity with the notice, sent a statement to the company of the plaintiffs' interest in the lands specified by the company. This statement contained the following passage: "Particulars of amount claimed. For compensation as respects two dwelling-houses in Fair Field Road and the mansion called the Hermitage and cottage adjoining, and the premises generally, the parties claim 660*l.*, and a deduction of 80*l.* a year from the rent of 136*l.* per annum reserved by the lease under which the claimants hold; the company making all necessary walls and fences."

On the 9th November, 1847, the company served another notice on the plaintiffs, requiring to purchase certain other portions of their premises, and informing them that the lands required * 121 by the second notice included *the whole of the lands specified in the first notice, and that the company would not take any further proceedings on such first notice.

On the 30th November, 1847, the plaintiffs, in conformity with the second notice, sent a statement of the particulars of their interest in the lands required by the second notice, and of their claim for compensation: this statement contained the following passage: "Particulars of amount claimed, specifying separately the proportion claimed for the value of the property and that for compensation: For compensation as respects two dwelling-houses in Fair Field Road and the mansion called the Hermitage and cottage adjoining, and this premises generally, the parties claim 766*l.*, and a deduction of 86*l.* per year from the rent of 136*l.* per annum reserved by the lease under which the plaintiffs hold; the company to make a brick wall to separate the railway from the site of the intended new street, and to make all other necessary walls and fences."

Some negotiation and correspondence took place between the solicitors for the company and the plaintiffs and those interested

in the reversion of the premises, with respect to the amount of compensation claimed by them respectively, and at a meeting of the solicitors and surveyors of the company, and of the several parties interested in the premises, on the 24th February, 1848, it was agreed that the plaintiffs should be allowed a deduction of 74*l.* from the rent payable by them to their lessors, and should receive as compensation 956*l.* for their interest and for consequential damage.

Long negotiations by letter took place between the respective solicitors of the plaintiffs and defendants for the sale of the plaintiffs' whole interest in the * premises, which resulted * 122 in the plaintiffs withdrawing a consent which they had previously given to sell their whole interest, and in a request by them to the company to confine themselves to the lands mentioned in the second notice. On the 30th June, 1848, the company, through their solicitors, sent a formal notice to the solicitor of the plaintiffs under the 85th section of the Lands Clauses Consolidation Act, 1845, in the following terms:—

“London and Blackwall Railway Extension and Messrs. Adams & Co. We have to inform you that the London and Blackwall Railway are desirous of entering upon and using the lands mentioned and described in their notice to your clients, dated 8th November, 1847, and therefore beg to inquire of you whether or not Messrs. Adams & Co. will consent to such entry before an agreement shall have been come to or any award made or verdict given for the purchase-money or compensation to be paid by the said company in respect of such lands. You will also take notice that if your clients do not on or before Tuesday next, the 4th July instant, signify their consent to such entry, the company will take such proceedings as are in the like cases directed by the Lands Clauses Consolidation Act, 1845. In the event of such proceedings becoming necessary, we have to name as the sureties to the bond required by the said Act, James Nugent Daniell, of Esher, in the county of Surrey, Esquire, and William Tite, of St. Helen's Place, Bishopsgate Street, in the city of London, architect and surveyor, and request that you will inform us whether or not you approve of such sureties.”

The company then procured a surveyor to be appointed by two justices, who valued the interest of the * plaintiffs * 123 at 100*l.* and the company paid the amount into the Bank of

England in the usual way as security for the purchase-money and compensation which should thereafter be found due to the plaintiffs. The company entered upon the plaintiffs' lands, and were at the time of the filing of the bill in the occupation thereof; and on the plaintiffs desiring them to summon a jury to assess the amount of damage and compensation, they refused to do so.

The bill, after various allegations of unfair conduct in the appointment of the surveyor, and that the 100*l.* paid into the Bank of England was grossly inadequate, charged, that the company ought forthwith to take steps to summon a jury; that by the service of the notice of the 8th November, 1847, a good and binding contract to purchase the plaintiffs' interest was constituted, and that the company ought to be compelled specifically to perform the same.

The bill prayed a declaration that the company ought forthwith to complete the purchase required by the notice of the 8th November, 1847, and that for the purpose of ascertaining the amount due to the plaintiffs in respect of their rights and interests in the premises and for consequential damages, the company might be decreed forthwith to take all fit and proper proceedings, in order that the amount of such purchase-money and compensation might be determined and settled according to the provisions of the Lands Clauses Consolidation Act, 1845, and that the amount of such purchase-money and compensation, when ascertained, might be paid by the company to the plaintiffs or the persons entitled thereto, under the directions of the Court, or be otherwise dealt with according to the provisions of the Lands Clauses Consolidation Act, 1845, and that the company might * be decreed to pay to the plaintiffs their costs of the suit.

To this bill the company demurred generally for want of equity; and the Vice-Chancellor having, on the 5th May, 1849, overruled the demurrer, the company now appealed to the Lord Chancellor.

Mr. Wood and *Mr. Bigg*, in support of the demurrer. — In this case the plaintiffs' remedy is at law, and, if so, this Court will not interfere. [On this point, they referred to *The King v. The Hungerford Market Company* (a) and *Adderley v. Dixon*. (b)] It is clear that a Court of Equity cannot be called on to make a com-

(a) 1 A. & E. 668, 676.

(b) 1 S. & S. 607.

pany perform a particular Act of Parliament. The position of vendor and purchaser in the present instance arises under the Act; and it never could be contended that the mere service of the notice would amount to a conversion out and out: it has, in fact, been decided that it does not alter the character of a lunatic's property. The doctrine of specific performance has no application to the present case. The jurisdiction in equity to decree specific performance arose out of the contract which the party was obliged to make out at law, and if he recovered "any thing by way of damages, this Court entertained the suit." *Dodsley v. Kinnersley*. (a) There is clearly no contract made out here by the notice which the company has served. The case of *Walker v. Eastern Counties Railway Company*, (b) and the observation of the Lord Chancellor in *Stone v. The Commercial Railway Company*, (c) that "the moment the company have given the notice, the relative situation of vendors and * purchasers is constituted * 125 between the parties," will be relied on by the plaintiffs; but the former of these cases was appealed and compromised, and the only point decided in the latter was, that a company having served a notice for a certain quantity of land could not issue a precept to the sheriff to summon a jury to assess the value of a less quantity of such land. Where there is an agreement to take lands at the valuation of A. and B., who decline to act, specific performance cannot be decreed. *Milnes v. Gery*, (d) *Wilks v. Davis*; (e) nor can there be a decree for specific performance of an agreement to refer to arbitration. *Gourlay v. The Duke of Somerset*. (g) The company having taken possession of the plaintiffs' premises under the 85th and 86th sections of the 8 & 9 Vict. c. 18, the plaintiffs' course is clearly indicated by section 68, whereby the amount of compensation may be settled either by arbitration or a jury, at the option of the plaintiffs. Another objection to the interposition of this Court is want of mutuality in respect of the remedy; for the company could not file a bill for a conveyance. [They also referred to the cases of *The London and North-Western Railway Company v. Smith* (h) and *Midland Counties Railway Company v. Oswin*. (i)]

(a) Amb. 403.

(b) 6 Hare, 594.

(c) 4 M. & C. 122.

(d) 14 Ves. 400.

(e) 3 Mer. 507.

(g) 19 Ves. 431.

(h) *Ante*, Vol. I. p. 216.

(i) 1 Coll. 74.

The Solicitor-General and *Mr. J. H. Law*, for the plaintiffs, submitted that a contract had been entered into between the parties by the service of the notice. *Stone v. The Commercial Railway Company*; (a) and that after the notice, the company could not have withdrawn from their contract. *Tawney v. The Lynn and Ely Railway Company*, (b) *Walker v. Eastern*

* 126 * *Counties Railway Company*. (c) Admitting for a moment that the remedy by mandamus may exist, yet the jurisdiction of this Court is not taken away. (They referred to *Ex parte Hawkins* (d) and *Richards v. The Attorney-General of Jamaica*, (e) and to the Lands Clauses Consolidation Act, 1845, sections 49 and 68.)

Mr. Wood, in reply.

July 4.

THE LORD CHANCELLOR, by the consent of all parties, delivered out the following judgment subsequently to resigning the Great Seal.

If, from the terms of the prayer of the bill, and the fact that a demurrer to it has been overruled, it should be inferred that this Court will generally lend its assistance to compel performance of the provisions of the Acts under which railways are formed and maintained, a proposition would be raised, which, if established, would lead to consequences of the most serious importance. I do not however think that any such inference can fairly be drawn from the decision of Vice-Chancellor WIGRAM in this case, because upon an examination of what fell from his Honor, it will be found that his judgment turned much upon the special allegations in the bill constituting, in his Honor's opinion, a statement of facts different from what appears to me to be the true construction of those allegations. His Honor considered the case stated in the bill to amount to this, that the company having given the second notice, had not proceeded to summon a jury under the Act; and

* 127 * under these circumstances, his Honor thought, relying on the case of *Walker v. Eastern Counties Railway Com-*

(a) 4 M. & C. 122.

(c) 6 Hare, 594.

(b) 16 Law J. Ch. 282.

(d) 13 Sim. 569.

(e) Before the Privy Council, July, 1848.

pany, (a) that this Court had jurisdiction to enforce the further proceedings. As I do not consider this as being the true construction of the facts alleged in the bill, I shall abstain from making any observations on the supposed rule of law, or the case referred to, and propose first to examine the various allegations of the bill, showing the relative situation of the parties, and then to consider the provisions of the Lands Clauses Consolidation Act, 1845, as applicable to the facts so stated.

The bill states the first notice and the claim of the plaintiffs; that this notice was abandoned and the second notice of the 8th November, 1847, substituted for it, upon which the plaintiffs, according to the provisions of the Act, put in a claim dated the 30th November, 1847, claiming 766*l.*, and a deduction of 86*l.* from their rent of 136*l.*; that this led to a negotiation terminating in an agreement under which the plaintiffs were to receive 956*l.* compensation, and have a deduction of 74*l.* from the rent. This agreement was afterwards repudiated by both parties, and the bill not praying any relief under it, but adversely to it, it forms no part of the case now existing between the parties. The bill then states that a negotiation took place for the purchase by the company of other premises, with which the plaintiffs refused to proceed; that the plaintiffs never agreed to an arbitration; that they repudiated their former claim, and were not bound by it, further injury having been sustained, and that the company had done the same. It next proceeds to state fruitless negotiations for a settlement by arbitration; * that the plaintiffs ultimately abandoned that course of proceeding, and called upon the company to take the necessary steps within one month to call a jury together, in order that the question in issue might be decided. The bill then, after stating a notice, dated the 30th June, 1848, given by the company for taking possession before payment, under the 85th section of the Lands Clauses Consolidation Act, 1845, and the consequent proceedings and possession taken, alleges that the amount of compensation and damage estimated under these proceedings was founded in error, and that the plaintiffs were entitled to much more, and also to much more than they had formerly claimed.

From this short abstract, it will be seen that the only facts sub-

(a) 6 Hare, 594.

sisting between the parties which can affect their rights are the second notice of the 8th November, 1847, the notice of 30th June, 1848, and the proceedings which followed under the 85th clause of the Lands Clauses Consolidation Act, 1845. Such, therefore, is the case to which the provisions of the Lands Clauses Consolidation Act, 1845, are to be applied. The Act, after providing the means by which the value of the land required by the company is to be ascertained, prohibits (sect. 84) the company from taking possession until such value shall have been paid or secured as thereby provided, and (sect. 89) imposes severe penalties for their so taking possession; but by the 85th section, when a company is desirous of possession before any agreement has been entered into or award made or verdict given, it is authorized to take possession upon payment into the bank of the sum claimed or fixed by a surveyor appointed by two justices as the value of the property, and giving a bond with sureties for payment of the purchase-money and compensation to be ascertained under the

* 129 provisions of the Act; and by the * 68th section, any party entitled to land taken or injured by the company, for which they have not made satisfaction, is to give notice to the company, stating his interest in the lands and the compensation he claims, and whether he wishes to proceed by arbitration or before a jury, and if the latter, the company are to pay the sum claimed, and enter into an agreement for the purpose, or issue their warrant for a jury within twenty-one days after the notice, and, in default, are made liable to pay the compensation claimed which the party is to recover by action in one of the Superior Courts with costs.

The Vice-Chancellor seems to have considered that, notwithstanding the provisions of the 68th section, and the taking possession under the 85th section, the relative position of the parties in the present case was to be considered as if nothing had taken place beyond the notice of the 8th November, 1847, and that such notice having constituted the relation of vendor and purchaser, this Court could enforce the performance of all the incidents to that relationship. It is I think quite true that, to a certain extent and for certain purposes, the compulsory taking of land under the railway Acts places the companies and the owners in the relative situation of purchasers and vendors, such, for instance, as to fixing between them the land to be taken. This was all that was

decided in *Stone v. The Commercial Railway Company*; (a) but it by no means follows that this Court will therefore take upon itself the specific performance of such sales. If, indeed, the proceedings lead to an agreement, the Court might do so, for then, although originating in the compulsory power, the purchase would be to be effected under a private agreement, and so other

* cases may arise: but whether it would do so if the case * 130 depended entirely upon the notice of taking the lands not followed by any agreement or indeed by any claim on the part of the owner (for such is the present case as stated by the bill), the amount of purchase-money therefore not being ascertained, is a question upon which I do not think it necessary to express any opinion, because I think that the circumstances of this case call for a decision founded upon very different principles.

It was properly observed in argument, that the power of summoning a jury was by the Act given exclusively to the promoters of the undertaking, and that the owner of the land had no power under the Act of compelling them to do so, and therefore that the Court's original jurisdiction over contracting parties might be exercised for the purpose of giving to the owner that compensation to which he is under the Act entitled. This assumes the existence of such original jurisdiction; but the fact seems to be, that the legislature having prohibited the promoters from interfering with the land until compensation was paid or secured to the owner, considered that this afforded a sufficient security that the promoters would proceed to have the value ascertained by a jury. In cases where such pressure would not exist, the Act adopts a very different course; for where the promoters are in possession of the land, not having paid the compensation, they are not left to their own discretion or to the pressure of their own wants to induce them to summon a jury, but the 68th section gives to the owner a prompt and effectual remedy to compel them to do so.¹ He is to make a claim stating the amount of compensation required, and if the promoters do not enter into an agreement to pay the same, or within twenty-one days issue their warrant for a jury, they are to be liable to * pay the sum claimed, to be recov- * 131
ered with costs in an action in one of the Superior Courts.

(a) 4 M. & C. 122.

¹ See *Armistead v. North Staffordshire R.R. Co.*, 16 Q. B. 526; 15 Jur. 944; 20 L. J., Q. B. 249.

That the situation of the parties in the present case is precisely that contemplated by this 68th section is I think very clear, for I concur with Vice-Chancellor WIGRAM in thinking that the 68th section applies to cases in which possession has been taken under section 85. Then, if that be so, the initiative for summoning a jury is not cast upon the promoters, but upon the owner, who is to make his claim and thereby give the promoters an opportunity of settling his demand without litigation, and the owner has the means of having his claim converted into a right, to be enforced by action at law, if the promoters shall delay for twenty-one days.

Now, although an old jurisdiction is not taken away by a new remedy being given, yet, if a new right be given, and a special remedy provided for enforcing it, such remedy must be pursued.¹ Here there is clearly a new right, that is, a right to compensation for land lawfully taken possession of by another; and, under the powers of the Act, a remedy is also clearly given, for the owner has only to make a claim, and he obtains a legal title to all he claims, unless the promoter can reduce it by the verdict of a jury. The Vice-Chancellor seems to adopt this view of the case; and, if the 68th section had been considered by him as regulating the rights of the parties, he would not, I apprehend, have overruled the demurrer. He was, however, of opinion, in conformity with his decision in *Walker v. Eastern Counties Railway Company*, (a)

that the notice of the 8th November, 1847, having given to
 * 132 this Court jurisdiction as a contract of purchase, the * 68th section had not taken it away, but that the owner was at liberty to resort to his position under the notice. Abstaining, then, from giving any opinion as to the effect of that position in giving

(a) 6 Hare, 594.

¹ See *Williams v. South Wales Railway*, 13 Jur. 443; 3 De G. & S. 354; *Mason v. Kennebec and P. R.R. Co.*, 31 Maine, 215; *Veazie v. Dwinel*, 50 Maine, 485; *Aldrich v. Cheshire R.R. Co.*, 21 N. H. 359; *Troy v. Cheshire R.R. Co.*, 23 N. H. 83; *Knorr v. White Water Valley Canal*, 1 Whart. 256; *McCormack v. Terre Haute and Richmond R.R.*, 9 Ind. 283; *Woods v. Nashua Manuf. Co.*, 4 N. H. 527; *Fiske v. Framingham Manuf. Co.*, 12 Pick. 68; *Baird v. Hunter*, 12 Pick. 555; *East and West India Dock and Birmingham Junction R.R. Co. v. Gattke*, 3 M'N. & G. 155; *New Albany and Salem R.R. v. Connelly*, 7 Porter (Ind.), 32; *Victory v. Fitzpatrick*, 8 Ind. 281; *Burnham v. Story*, 3 Allen, 378; *Spring v. Russell*, 7 Greenl. 273; *Stowell v. Flagg*, 11 Mass. 464; *Hill v. Sayles*, 12 Met. 143; *Kimble v. White Water Valley Canal*, 1 Carter, 285; *White v. Boston and Prov. R.R.*, 6 Cush. 420; *Kennett Nav. Co. v. Withington*, 11 Eng. L. & Eq. 472; 1 Redfield Railw. (8d ed.), 336.

this Court jurisdiction when nothing more has been done, I think that what subsequently took place in the present case essentially altered the condition of the parties. The Act does not consider the notice as constituting a contract, but as a preliminary step bringing the parties together who are afterwards to settle the matter between them by agreement, arbitration, or the verdict of a jury.

In the present case the notice by the promoters was followed by a claim on behalf of the owner, and a regular agreement according to the statement in the bill entered into between the parties. So far the object of the notice of the 8th November, 1847, had the effect intended by the Act in procuring from the owner a statement of his claim and the making of an agreement between the parties: but, subsequently, this agreement was repudiated by both parties, and the claim abandoned. Under these circumstances, the promoters, finding that no progress was made, resorted to the provisions of the 85th section of the Act, which, with the aid of those of the 68th section, were calculated to lead to some settlement of the matter. The plaintiffs, however, by their bill, seek to proceed under the earlier provisions of the Act, and call upon the Court to compel the promoters to issue their warrant for a jury; but by the 21st section this is to be done only if no claim is made and no agreement come to. The bill however states that a claim was made and an agreement concluded. It cannot be that the notice *per se* gives to this Court jurisdiction, for if this were so the jurisdiction would arise as soon as the notice was given. On that step being taken, however, three modes of proceeding * are pointed out by the Act, an agreement, an arbitration, * 133 and a jury, the last only in the event of the two first not taking effect. At the time, therefore, of the notice being given, it must be uncertain which course will be adopted, and the Court therefore have no guide as to what course it ought to enforce. It is only after the time for an agreement or arbitration has expired, that the jurisdiction to enforce proceedings before a jury can arise; but that time cannot ever arrive, where a valid agreement has been entered into.

It appears to me that what has taken place between these parties takes this case out of the principles of the decision of *Walker v. Eastern Counties Railway Company*; (a) and that the rights of

the parties are to be regulated by the 85th section of the Act, which, with the aid of the 68th section, gives to the owner a short and simple remedy for compelling compensation from the promoters; and that he has this remedy in addition to his right to a mandamus, both being remedies much more prompt and efficacious in such a case as this, and attended with much less expense. I am, therefore, of opinion, that the demurrer ought to have been allowed, and that the order appealed from must be reversed.

* 134

* *In re* EDWARDS, a Lunatic.

1850. February 16.

Order made for payment of lunatic's maintenance to a married woman (committee of the person) on her separate receipt, her solicitor undertaking that the money should be duly applied.

In this case there was an order to pay the lunatic's maintenance to a married woman, who was committee of his person. She was, at the time of the present application, living apart from her husband.

Mr. Bacon asked that the allowance for maintenance might be ordered to be henceforth paid to her on her separate receipt.

THE LORD CHANCELLOR said that he could not do this without having an undertaking for the due application of the money. His Lordship finally made the order upon the undertaking of the solicitors of the married woman.

HIRST *v.* TOLSON.

1850. February 27, 28. March 2.

An attorney, to whom a clerk was articulated, died before the articles expired: *Held*, that the Court had jurisdiction to entertain a claim for the return of a part of the premium, and that such claim constituted a debt payable out of the assets of the attorney.¹

¹ *Atwood v. Maude*, L. R. 3 Ch. Ap. 369; *Freeland v. Stansfield*, 1 Jur. N. S. 8; 1 Story Eq. Jur. §§ 472-474; *Craven v. Stabbins*, 13 W. R. 208.

THE question in this case was whether, where an attorney to whom a clerk had been articled died before the expiration of the apprenticeship, a Court of Equity had power to order part of the premium paid to the attorney to be repaid out of his assets.

The cause was heard before the Vice-Chancellor of England on the 25th April, 1849, and his Honor decided in the affirmative. The argument and judgment * will be found reported * 135 in the 16th volume of Mr. Simons's Reports, p. 620.

From the decision of the Vice-Chancellor, the defendant now appealed to the Lord Chancellor.

Mr. Rolt and Mr. Rogers, for the plaintiff.

Mr. R. Palmer and Mr. Amphlett, for the defendant.

The only new authorities cited before the Lord Chancellor were *Ex parte Bayley*, (a) *Blundell v. Brettargh*, (b) *Lockley v. Eldridge*, (c) *Therman v. Abell*, (d) *Hare v. Groves*, (e) *Stokes v. Twitchen*. (g)

March 2.

THE LORD CHANCELLOR. — It is singular that the question in this case should be one upon which there appears considerable authority in early times, and so very little to be found in modern times. It is an unfortunate matter to be the subject of litigation, and it would have been still more so had I thought it necessary to send the parties to a Court of Law. The case is one which must frequently occur. The master of an articled clerk bound for a number of years dies before the period expires; the clerk of course loses the benefit of that for which he contracted, and the premium which his friends have paid for him. The question then arises, what is the remedy of the articled clerk? If there is a claim against the personal representative * of the * 136 master, it would be for this Court to consider whether the demand should be at law or in equity. This Court does not, however, send all cases to law when a party comes here to ask for payment of a demand by means of administering the estate; and although, in the present instance, I think that the personal representatives of the testator would have better consulted the justice

(a) 9 B. & C. 691.

(b) 17 Ves. 241.

(c) Finch, 124.

(d) 2 Vern. 64.

(e) Anst. 687.

(g) 8 Taunt. 492.

of the case, if they had not raised this litigation, yet, as they have thought proper to resist the demand that the friends of the young man have made for a return of a part of the premium, it is my duty now to adjudicate upon the rights so claimed by the parties.

Now there are two modes in which this case may be viewed. If the question arose upon a covenant, this Court would have no original jurisdiction, and the only claim would be the damages which a jury might assess upon a breach of that covenant; but if, independently of the right under the covenant, there is a right arising from the transaction itself, and which would have existed if there had been no covenant, namely, to a return of a portion of the money paid upon the ground that the consideration for which it was paid failed, then that would certainly be a ground of equitable interference which this Court would regard in administering the estate of an intestate. The transaction itself, independently of the covenant, would give to the party whose money was so advanced a right to recover it back; and, without referring to the older authorities, we find Lord KENYON and Lord Chief Justice GIBBS thus dealing with the question. In the case before Chief Justice GIBBS, (a) the claim was made, against a party not dead but where the consideration had failed, upon the ground * 187 that the money had been advanced for * a benefit which had not been realized in consequence of a legal defect in the articles. The facts were, that a premium had been paid to an attorney for taking an articulated clerk; but the articles did not contain a statement of the premium: this, it was held, made them void within the Act of Parliament; and the only question discussed was whether the omission was an error, or was a fraud upon the revenue intended by and brought home to both parties. Chief Justice GIBBS, in giving the judgment of the whole Court, was of opinion that the plaintiff, the mother of the young man, was as much to blame as the defendant, and therefore she could not be at liberty to recover, because the claim was founded upon an attempt to defraud the revenue, and was a violation of an Act of Parliament, which Act of Parliament in that case made the articles void, and therefore it was that the Court refused the relief prayed. But Chief Justice GIBBS says, "Supposing the plaintiff to be an innocent party, she who is the mother of the

(a) *Stokes v. Twitchen*, 8 Taunt. 492.

apprentice would be entitled to recover the money so paid as being paid without consideration." Thus we have it expressed in terms that if the plaintiff had been an innocent party, if there had not been a violation of the Act, then she would have been entitled to recover the money back.

Now that goes the whole length of the plaintiff's proposition in the present case; for whether the consideration fails by a defect in the articles which makes them not of a binding character, or whether it fails by the death of the party before the time for which the contract was made expires, is quite immaterial. There is a premium paid for a risk not run, and money given in anticipation of a future benefit, which is not enjoyed. In either case, the consideration failing, the money must be paid back again. Thus it is with an annuity which * becomes void by a legal * 138 defect. All these are instances of a payment made by anticipation for something hereafter to be enjoyed; and if circumstances arise so that that future enjoyment is denied, the party paying is not to lose his money. In the present case, therefore, the party paying for future instruction which he cannot receive is entitled to recover back his money.

The authorities establish beyond all question that there is in a transaction of this sort an equity arising totally independent and unconnected with the covenant; and if that be so, are the parties precluded from coming against intestates' or testators' estates for the recovery of a demand so constituted? It is not like a case where the right depends upon what a jury may assess, although it is in the character of a demand arising upon ascertaining an amount of unliquidated damages. Now I find as early as the time of *Vernon and Finch* that no question seems to have been raised as to the jurisdiction of Courts of Equity to entertain claims of this sort; and such claims appear not only to have been carried to the extent now required, but a great deal further. In the case of *Newton v. Rowse (a)* it is difficult to discover upon what grounds the Court proceeded; but it is a distinct and decided authority in favour of the jurisdiction of this Court; for though the fact of the apportionment of the premium there made cannot at this time of day be explained, the decision upon the question of jurisdiction is left quite untouched. Now no case has been

(a) 1 Vern. 460.

referred to where, in more modern times, and in administering an estate, this species of claim has been rejected as one which the Court will not entertain; but I find a case before Lord KENYON,

Hale v. Webb, (a) where an application was made for the * 139 return of a premium, and the point * immediately arose whether it was a case in which the Court had jurisdiction.

The question was not entertained, but no opinion was expressed against the jurisdiction, and the Court decided the case upon the special circumstances.

There can, therefore, be no possible reason for saying that this Court has not jurisdiction in favour of claims of this sort. The only thing that I have to consider is, whether the claim is one which can be at once safely adjudicated upon, or whether I am bound to send the party to law to establish his title first, and then to come here against the estate. Acting upon the ordinary rules affecting the administration of the estates of deceased debtors, I am of opinion that at all events it is a debt; that certainly it is a debt at law, and I think also a debt in equity; and that it is a case in which the party proving such a debt is entitled to the decree he asks for; namely, the administration of the estate. I think that the Vice-Chancellor of England's decree is right, and that the appeal must be dismissed with costs.

LORTON v. KINGSTON.

1850. March 7.

The Lord Chancellor refused to make an order for the service of a copy of the bill, under the terms of the 23d Order of the 26th August, 1841, upon a defendant in Ireland.

MR. PEARSON now renewed an application, which had been refused by the Vice-Chancellor of England, for leave to serve a defendant out of the jurisdiction in Ireland, with the copy of an amended bill under the 23d Order of the 26th August, 1841.

By the 2 & 3 Will. 4, c. 33, the Court may order service of

(a) 2 Bro. C. C. 78.

subpœna and all subsequent process on defendants in any part of the United Kingdom; and by *the 3 & 4 Vict. c. *140 94, the Court is empowered to make alterations in the forms of writs, &c., and in the pleadings and practice of the Court.

The question was, whether the terms of the 23d Order of the 26th August, 1841, were comprehensive enough to authorize the service of the copy of the bill on a defendant out of the jurisdiction.

THE LORD CHANCELLOR said, that the Act of Parliament (2 & 3 Will. 4, c. 33) only authorized the service of a *subpœna* on a defendant out of the jurisdiction, and that the general orders of the Court did not provide for such a case as the present; and refused the motion.

NICHOLS v. WARD.

1850. January 31. March 9.

Practice as to enforcing answers from husband and wife where the latter is living separate from her husband and out of the jurisdiction.¹

In this case William Ward and Frances his wife were defendants to a foreclosure suit in respect of the separate property of

¹ If the separate answer of the husband is received and filed in the clerk's office, before an order for him to answer separately has been obtained, it is an irregular proceeding: *Gee v. Cottle*, 3 M. & C. 180; see *Garey v. Whittingham*, 1 S. & S. 163; *Lenaghan v. Smith*, 2 Phil. 539; and the plaintiff may move, on notice to the husband, that the answer may be taken off the file for irregularity; *Gee v. Cottle*, *supra*, *Collard v. Smith*, 2 Beasley (N. J.), 43, 45; or he may sue out an attachment against the husband, for want of the joint answer: *Gee v. Cottle*, *Garey v. Whittingham*, *supra*; or he may waive the irregularity, and move, on notice to the wife, and an affidavit of the facts, that she may answer separately. 1 Dan. Ch. Pr. (4th Am. ed.) 180, 181. If the suit relates to the separate estate of the wife and she is abroad, the plaintiff, where no order for her to answer separately has been obtained by her or her husband, may, on motion supported by an affidavit of the facts, obtain an order that she may answer separately from her husband. 1 Dan. Ch. Pr. (4th Am. ed.) 181, 182; *Hope v. Carnegie*, L. R. 7 Eq. 254. Notice of the motion should be given to the wife; and if she is abroad, an order for leave to serve her there with the notice is necessary, and may be obtained on an *ex parte* motion: 1 Dan. Ch. Pr. (4th Am. ed.), pp. 182, 499, 500; see *Leavitt v. Cruger*, 1 Paige, 422.

Mrs. Ward. W. Ward was duly served on behalf of himself and wife with a *subpœna* to appear and answer. He appeared for himself only, and the plaintiff entered an appearance for the wife. On the 24th December, 1839, W. Ward, who defended *in formâ pauperis*, put in a separate answer for himself only, his wife having gone out of the jurisdiction subsequently to the appearance being entered for her.

On the 12th January, 1850, the plaintiff moved before the Vice-Chancellor WIGRAM to take this answer off the file for * 141 irregularity, on the ground that W. Ward ought * to have obtained an order for his wife to answer separately. Upon this motion his Honor made an order, the husband not opposing, that F. Ward, the wife, should be at liberty to answer separately from her husband.

The plaintiff (who had not taken an office copy of the answer) now moved to discharge the order of the Vice-Chancellor, and also to take the answer off the file in the terms of his original motion.

Mr. Baggallay, in support of the motion, contended that the answer put in by the husband was irregular, and that the plaintiff was entitled to have it taken off the file, in order that when the proper time came he might attach the husband for contempt. He referred to a case of *Steele v. Plomer (a)* as showing that W. Ward could not safely be attached for want of answer while the present irregular answer remained on the file of the Court.

[THE LORD CHANCELLOR. — If the husband were in contempt for not putting in a joint answer, his putting in a separate answer for himself only would not discharge him. If the wife did not choose to answer, the contempt would not be cleared, and the husband would not gain any thing by the order made by the * 142 Vice-Chancellor. * This order was made in the absence

(a) In this case (before the Lord Chancellor, February 8, 1849), the husband was in contempt for want of the joint answer of himself and wife, and a writ of sequestration was issued against him. He then put in a separate answer, without obtaining any previous order enabling him to take this course, and moved to be discharged from his contempt. The Vice-Chancellor KNIGHT BRUCE made an order accordingly; and on a motion to discharge this order, the Lord Chancellor refused to interfere, on the ground that the plaintiff had taken no step to get rid of the irregular proceeding, and had therefore adopted it.

of the wife, and in no way prevents the plaintiff putting the husband in contempt. If the answer is taken off the file, and the husband then comes to the Court for an order he will be right.]

Mr. Beale, contra, submitted that the motion was premature, the time for putting in the joint answer not having actually expired.

Mr. Baggallay, in reply, stated that he should be satisfied if the order of the Vice-Chancellor were discharged, and the rest of the motion allowed to stand over in order to give the defendant an opportunity of making a fresh application to the Vice-Chancellor.

THE LORD CHANCELLOR considered this to be a proper course to be adopted, observing that the order of the Vice-Chancellor was useless to the defendant.

It was, therefore, by the consent of both parties ordered, that the order of the Vice-Chancellor should be discharged, and that the rest of the motion should stand over until the third seal after the present term, with liberty for the defendant W. Ward to take such proceedings as he might be advised to clear his contempt in answering separately, the plaintiff by his counsel undertaking not to sue out any process of contempt against the defendant W. Ward in the mean time.

March 9.

In consequence of the above order, the defendant W. Ward, on the 7th March, 1850, moved before the Vice-Chancellor WIGRAM, that the defendant Frances Ward might be ordered to put in a separate answer, and that he W. Ward might not be in any manner *responsible for any neglect or refusal to put in *143 such answer, nor liable to any attachment or process in consequence of such neglect or refusal.

When the motion came on before the Vice-Chancellor, the plaintiff's counsel having objected that notice of motion had not been duly served on Frances Ward, his Honor, without determining that question, made an order that the defendant W. Ward should not be in any manner responsible for any neglect or refusal on the part of his wife to put in a separate answer, nor be liable to any attachment or process in consequence of such neglect or refusal.

Mr. Baggallay now moved before the Lord Chancellor to have the motion finally disposed of, and stated that, assuming the last-mentioned order made by the Vice-Chancellor to be regular, the plaintiff was not desirous of raising any further objection, his only object being to be put in such a position as would enable him to except to the answer of *W. Ward*, if upon examination it should turn out to be insufficient.

In consequence of this statement, and by agreement between the parties, it was arranged, with the sanction of the Lord Chancellor, that the time for excepting should run from the present day, and that no further order should be made on the motion. (a)

NOTE.—Leave was subsequently granted by the Vice-Chancellor, on the motion of the plaintiff, to serve *Frances Ward* in the Isle of Man with a notice of motion to put in an answer to the plaintiff's bill separate from her husband. On the 1st May, 1850, the motion was made, and an order obtained accordingly.

1850. May 27.

The Lord Chancellor refused upon motion to appoint a receiver of a partnership, where the question raised was, whether the partnership had been dissolved; but directed an issue to try that fact.¹

THIS was a motion by the defendant to discharge an order made by the Vice-Chancellor of England for the appointment of a receiver and manager in a suit for the dissolution of a partnership.

The bill alleged that the partnership in question was a partnership at will, and had been determined by notice in February, 1850, and prayed a declaration accordingly. The evidence consisted of

(a) This form of order was ultimately adopted, instead of that originally proposed, which was to make the answer bear date as of the 9th March.

(b) This case was heard by the Lord Chancellor at his private residence, but the reporters have been kindly furnished with the means of giving the above report.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1727; *Chapman v. Beach*, 1 J. & W. 594; *Lindley Partn.* (Eng. ed. 1860) 856; *Collyer Partn.* (Perkins's ed.) § 381; *Goulding v. Baire*, 4 Sandf. 716.

conflicting affidavits upon the point, whether the partnership was a partnership at will or for a term of twenty-one years, the plaintiff contending for the former and insisting on the fact of the dissolution.

Mr. Rolt and *Mr. Toller*, for the defendant, and in support of the motion, referred to a case before Lord ELDON of *Goodman v. Whitcomb*, (a) and cited the following passage from the judgment as showing that the Court would not appoint a receiver unless it was clear that a dissolution of partnership must be declared: "This is a bill filed for the purpose of having a dissolution of the partnership declared, and if the Court can now see that that *must* be done, it follows very much of course that a receiver must be appointed; but if the * case made stands in such a state * 145 that the Court cannot see whether it will be dissolved or not, it will not take into its own hands the conduct of a partnership, which only *may* be dissolved."

[THE LORD CHANCELLOR.—The word "must" is to be taken with some allowances. Every case is to be governed by its own circumstances.]

Mr. J. Parker and *Mr. H. Prendergast*, contra.

THE LORD CHANCELLOR was of opinion that the question could not be decided on the present motion; and, acting on the principle laid down in *Peacock v. Peacock*, (b) directed an issue, to be tried at the next Yorkshire assizes, the terms of such issue to be, whether on the 11th February, 1850 (the day after the service of the notice of dissolution), any partnership was subsisting between the plaintiff and the defendant.

(a) 1 J. & W. 589.

(b) 16 Ves. 49.

*146

* BETWEEN

JOHN GRAHAM, on behalf of himself and all other the Shareholders or Proprietors of Shares in the BIRKENHEAD, LANCASHIRE, and CHESHIRE JUNCTION Railway Company, except such as are Defendants hereto . . . Plaintiffs.

AND

The BIRKENHEAD, LANCASHIRE, and CHESHIRE JUNCTION Railway Company, and JAMES BANCROFT, WILLIAM BALLENY, RICHARD BRYANS the Younger, CEPHAS HOWARD, WILLIAM GIBB, ISAAC TAYLOR, EDWARD TOOTAL, and JAMES BROWN when within the Jurisdiction, and PETER CATTERALL, JOHN ROGERS, and HENRY THOMAS HOPE . . . Defendants.¹

1850. May 30.

The directors of a railway company, with the concurrence of a majority of the shareholders, on finding the original undertaking impracticable proceeded to construct a small portion only of the works. On an application by an individual shareholder on behalf of himself and the other shareholders for an injunction to restrain this proceeding, the Court refused to interfere, on the ground of the acquiescence of the plaintiff, and also that the other shareholders had for eighteen months previously to filing the bill known, or had had the means of knowing, the acts complained of.²

THIS was an application by the defendants to dissolve an injunction granted by the Master of the Rolls on the 27th May, 1850,

¹ S. C., 2 H. & T. 450.

² See *Ffooks v. London & S. W. R.*, 19 Eng. L. & Eq. 7; *Gregory v. Patchett*, 13 W. R. 34. As to the effect of delay, or laches, or neglecting remedies, or acquiescing in or encouraging the acts complained of, see *Buxton v. James*, 5 De G. & S. 80; 16 Jur. 15; *Attorney-General v. Eastlake*, 11 Hare, 205, 228; 17 Jur. 801; *Pillow v. Thompson*, 20 Texas, 206; *Tash v. Adams*, 10 Cush. 252; *Fuller v. Melrose*, 1 Allen, 166; *Borland v. Thornton*, 12 Cal. 440; *Gray v. Ohio and Penn. R.R. Co.*, 1 Grant Cas. 412; *Briggs v. Smith*, 5 R. I. 213; *Phelps v. Peabody*, 7 Cal. 50; *Little v. Price*, 1 Md. Ch. Dec. 182; *Burden v. Stein*, 27 Ala. 104; *Senior v. Pawson*, L. R. 3 Eq. 330; *Bassett v. Salisbury Manuf. Co. and Salisbury Mills*, 47 N. H. 426, 439; *Odlin v. Gove*, 41 N. H. 465; *The Rochdale Canal Co. v. King*, 2 Sim. N. S. 781; *Wood v. Sutcliffe*, 2 Sim. N. S. 163; *Binney's Case*, 2 Bland, 99; *Peabody v. Flint*, 6 Allen, 52; 2 Dan. Ch. Pr. (4th Am. ed.) 1639, 1640, 1663; *Gordon v. Cheltenham R.R.*

in the terms hereinafter mentioned. The following are the facts of the case, so far as material to the points referred to in the judgment of the Lord Chancellor.

In 1837, the Chester and Birkenhead Railway Company, which was formed for the purpose of making a railway from Chester to Birkenhead, obtained their Act of Parliament, under which powers were conferred on the company of making certain lines and works, and of * raising and borrowing money for this object. * 147 The company completed their works, and fully exercised the powers of borrowing conferred upon them.

The Birkenhead, Lancashire, and Cheshire Junction Railway Company, by certain Acts of Parliament, namely, the "Birkenhead, Lancashire, and Cheshire Junction Railway Company's Act, 1846," and the "Birkenhead, Lancashire, and Cheshire Junction Deviation of Main Line Act, 1847," obtained powers for making a railway from the Chester and Birkenhead Railway to the Manchester and Birmingham Railway, with certain branches therefrom, the shares of the company being fixed at 45,000 of 3*l.* 6*s.* 8*d.* each. The Act of 1846 contained a provision enabling the company to borrow money on mortgage or bond to the extent of 500,000*l.*, but no part of such sum was to be borrowed until the whole of the capital of the company should have been subscribed, and one-half thereof actually paid up. The lines and works thus authorized to be made, exclusive of a certain portion of the line by the Act of 1847 directed to be abandoned, extended a distance of forty-six miles, and were intended to open a direct and independent communication between Birkenhead and Chester and Manchester and Stockport and the other manufacturing districts in that neighbourhood, the object being to establish such communication between the said manufacturing districts and the port of Birkenhead.

In the year 1847, an Act was passed for incorporating the Chester and Birkenhead Railway with the Birkenhead, Lancashire, and Cheshire Junction Railway; and by this Act shares of 27*l.* 10*s.* and 22*l.* each were created for the purpose of being allotted to the

Co., 5 Beav. 229, 237; *Coles v. Sims*, Kay, 56, 70; 5 De G., M. & G. 1; 18 Jur. 683, 685; *Cooper v. Hubbuck*, 30 Beav. 160; 7 Jur. N. S. 457; *Great Western Railway Co. v. Oxford, Worcester, &c., Railway Co.*, 3 De G., M. & G. 341, 359; *Attorney-General v. Sheffield Gas Co.*, 3 De G., M. & G. 304, 327; 17 Jur. 667, 680; 2 Story Eq. Jur. § 969 a.

shareholders in the former company, and the shares of 83*l.* *148 6*s.* 8*d.* in the latter company, were reduced to 31*l.*, * the holders of these three different classes of shares being entitled to share *pari passu* with each other, in proportion to the amounts paid up. The provisions of this Act were carried out, and the two companies were united into one accordingly.

On the 1st January, 1847, the Birkenhead, Lancashire, and Cheshire Junction Railway Company entered into a contract with Thomas Brassey, by which he agreed to execute certain portions of their works, such works to be completed in November, 1848. Brassey commenced the works accordingly, but in September, 1847, the directors of the company, in consequence of pecuniary difficulties, suspended all the works then in progress, Brassey being willing to allow the works to be abandoned upon condition of being paid for all works actually executed, and the cost of plant, &c., employed. The works of the company remained suspended from October, 1847, to March, 1849.

In January, 1848, the directors applied to the commissioners of railways for an extension of the time for exercising their compulsory powers of taking land; but having subsequently ascertained that the execution of the whole of the lines and works originally contemplated was impracticable, they intimated the same to the commissioners, and in consequence no warrant for the extension of time was issued. The directors then determined to apply to Parliament for power to abandon the lines and works originally contemplated, with the exception of those between Chester and Lower Walton. This portion comprised an extent of not more than seventeen miles, of which about ten miles only was of the main line between Birkenhead and the manufacturing districts.

The directors further determined that this railway from *149 Chester to Lower Walton should * communicate with the London and North Western Railway, the expense of this communication being estimated at 450,000*l.* On the 25th November, 1848, a resolution was passed, after some opposition, at a special meeting of the shareholders of the company, authorizing the directors to carry the intended plan into effect. In February, 1849, the directors accordingly procured a bill to be introduced into Parliament for the purposes proposed, but in consequence of the opposition of certain of the shareholders, and alterations which were thereupon made in the bill, they ultimately, with the sanction

of a resolution come to by a majority of the shareholders of the company, abandoned its further prosecution.

On the 10th February, 1849, the directors made a call of 10*l.* per share on each of the 31*l.* shares; and on the 26th June, 1849, the company's compulsory powers of taking land under the Act of 1846 expired.

In August, 1849, some of the shareholders filed a bill (*Irving v. Bancroft*) against the directors to restrain them from making the railway from Chester to Lower Walton only, and on the 10th August, 1849, moved before the Vice-Chancellor of England for an injunction accordingly; but on the undertaking of the company "to complete the railway and works according to the Birkenhead, Lancashire, and Cheshire Junction Railway Act, 1846, and the subsequent Act Deviation Line, 1847, and the Amalgamation Act, and if necessary for that purpose to apply to Parliament," the motion was ordered to stand over. The plaintiffs in this suit not having paid the call of 10*l.* made in February, 1849, their shares were in December, 1849, declared forfeited, and the further prosecution of the suit was thus stayed.

* On the 19th January, 1850, at a special meeting of shareholders of the company, a resolution was passed for borrowing 200,000*l.*; and on the 23d January, 1850, the directors made further calls; viz., of 2*l.* on the 22*l.* shares, and 3*l.* on the 31*l.* shares. At this time, one-half of the amount of the capital of the company had not been paid up as required by the Act of 1846.

On the 9th February, 1850, P. W. Dumvile, one of the shareholders of the company, on behalf of himself and all other the shareholders in the company except the defendants, instituted a suit against the company and the directors for a similar purpose to the suit now under discussion. The company on the 16th February, 1850, demurred to this bill for want of equity and parties; and on the 2d March, 1850, the demurrer was overruled by the Master of the Rolls, with costs. The plaintiff Dumvile then gave notice of a motion for an injunction, but this never came on to be heard in consequence, as it was alleged, of some private arrangement or compromise entered into with the directors; and on the 23d March, 1850, the bill was, by consent, dismissed.

It appeared that none of the shareholders of the company paid the calls of 2*l.* and 3*l.* made in January, 1850; and further, that a large number of shares in the company had at different times

been forfeited, such forfeitures being unconnected with the matters now in dispute.

On the 4th May, 1850, John Graham, who was a holder of seven shares of 81*l.* each, and who had paid the call of 10*l.* made in February, 1849, filed the present bill against the company and the directors. The bill set out the several facts above men-

* 151 tioned ; * and in reference thereto contained, among other matter, statements to the following effect : that the calls made and payable previously to the directors entering upon the plan of making the railway from Chester to Lower Walton only, were sufficient to answer the liabilities of the company, including the works actually executed by Brassey ; that one of the objects of the directors was, to abandon all the lines and works originally contemplated, except the line between Chester and Lower Walton, in favour of the London and North Western Railway Company ; and that, in May, 1849, they entered into an agreement with the London and North Western Railway Company for that purpose ; that, at the time when the compulsory powers of the company for taking land expired, the directors had taken no steps for the purchase of land except for the railway between Chester and Lower Walton ; that the directors never made any application to Parliament for additional powers according to their undertaking in *Irving v. Bancroft* ; and had abandoned all intention of applying for and obtaining any Act ; that the directors continued to proceed with the construction of the railway from Chester to Lower Walton only, and in applying the capital and funds of the company for that purpose, and had determined not to construct, or attempt to construct, any other portion of the works ; and that under the circumstances, including the fact of the large number of shares which had been forfeited, it had become and was impracticable for the company to construct the lines and works as authorized and required by their special Acts ; that the calls of 10*l.*, 2*l.*, and 3*l.*, respectively, had been made exclusively for the illegal purpose of providing funds for constructing the proposed railway from Chester to Lower Walton only ; and that neither of such calls had been

made or was intended for the purpose of applying the proceeds * towards making and completing the entirety of the lines and works authorized by Parliament, or for any other lawful purpose of the company ; that in consequence of the institution of the suits by Irving and Dumville, respectively, the plain-

tiff and the other shareholders who disapproved of the proceedings of the directors had been induced to refrain from instituting proceedings against them ; and that the plaintiff had only within a few days learnt the fact of the arrangement between the company and Dumville ; that on the 1st January, 1850, all the proprietors of all classes of shares became entitled to share the profits of the company equally, in proportion to the amounts actually paid up on their shares ; that the defendants threatened and intended to forfeit the shares of the plaintiff and others for non-payment of the calls of 2*l.*, and 3*l.*, respectively ; that the proprietors of the 27*l.* 10*s.* shares had no interest in requiring any further calls to be made or paid up on the 31*l.* shares and 22*l.* shares respectively, or any of them, except for the lawful purpose of such further calls being applied in making and constructing the whole of the lines and works as authorized by Parliament, or for some other lawful purpose of the company ; that the defendants intended to bring actions against the plaintiff and others, to enforce the payment of the calls of 2*l.* and 3*l.* respectively.

The bill, after submitting that it was not within the powers of the company, or of the directors, to make the proposed railway from Chester to Lower Walton only, or to apply any part of the capital or funds of the company for that purpose, or any otherwise than for the making and completing the whole lines of railway and works of the company in pursuance of the powers vested in them by the special Acts, or to make or enforce the payment of any calls upon the shareholders * of the company, * 153 with the view to apply the proceeds of such calls in or towards the construction of the proposed railway from Chester to Lower Walton only, or any otherwise than for the purposes authorized by the company's special Acts, prayed, that it might be declared that it was not within the powers of the company, or of the directors thereof on behalf of the company, to make the proposed railway from Chester to Lower Walton only, or to apply any part of the capital or funds of the company in or towards the construction of the railway from Chester to Lower Walton only, or any otherwise than for the purpose of making and completing the several lines of railway and works of the company in pursuance of the powers vested in them by the special Acts of the company, or to make or enforce the payment of any calls upon or by the share-

holders of the company or any of them, or to raise by mortgage, debentures, or otherwise any moneys on behalf of the company, with the view to apply the same in or towards the construction of the proposed railway from Chester to Lower Walton only, or any otherwise than for the purposes authorized by the said special Acts ; and that it might be declared that the sum of 200,000*l.* could not at present be legally borrowed by the company ; and that the defendants, the directors, might be decreed to indemnify and save harmless the company and the funds thereof from the consequences of the aforesaid illegal acts and proceedings of the directors, and from all losses and expenses which had been or should be incurred or sustained by the company by reason or means thereof, and particularly in respect of all such sums which, since the said works were resumed in March, 1849, had been expended in or towards constructing the railway from Chester to Lower Walton ; and that the company and the directors might be respectively restrained

* 154 from making or continuing to make the proposed * railway from Chester to Lower Walton only, and from applying any part of the capital or funds of the company in or towards the construction or completion of the said railway from Chester to Lower Walton only, or any otherwise than for the purpose of making and completing the entirety of the said lines of railway and works of the company in pursuance of the powers vested in them by the special Acts of the company, or which might thereafter become vested in them by Act of Parliament, and also from borrowing the said sum of 200,000*l.* or any part thereof, or executing any mortgages or debentures under the common seal of the company in respect thereof, and also from making any further call or calls, or enforcing the payment of the said several calls of 2*l.* and 8*l.*, or either of them, upon or by the shareholders of the company or any of them, with the view to apply the proceeds of such calls or any of them, or such moneys or any part thereof respectively, in or towards the construction or completion of the proposed railway from Chester to Lower Walton only, or any otherwise than for the purposes authorized by their said special Acts, and also from forfeiting or giving any notices or notice to forfeit the shares of the plaintiff and the other shareholders in the company or any of them, respectively, for non-payment of the said calls or any further call to be illegally made as therein mentioned, and also from com-

mencing or prosecuting any action or actions at law against the plaintiff for or in respect of the said matters in the bill mentioned or any of them.

On the 4th May, 1850, the plaintiff gave a notice of motion before the Master of the Rolls, in the terms of the prayer of the bill, for an injunction to restrain the directors from making a railway from Chester to Lower Walton only, and from applying the capital and funds of the company to any other purpose than completing * the entirety of the lines and works, also from * 155 borrowing the 200,000*l.*, and making any further calls, or enforcing by forfeiture or otherwise, the payment of the calls of 2*l.* and 3*l.*, and also from forfeiting or giving notice to forfeit the shares of the plaintiff and the other shareholders for non-payment of the said calls or any further call.

This motion came on to be heard before the Master of the Rolls on the 22d May, 1850, affidavits being filed on both sides; and, on the 27th May, 1850, his Lordship granted an injunction according to the notice of motion, except that, as to moneys to be raised, the injunction was to restrain the raising except for the purpose of paying off loans, and that, as to the calls (the last clause of the notice of motion being struck out), it was provided that the injunction should not extend to restrain the company or the directors from making calls or enforcing payment of those already made, for the purpose of paying any debts or liabilities of the company other than debts or liabilities contracted since the bill filed, or (without prejudice to any question in the cause) for the purpose of paying Brassey in respect of any works done before the bill filed.

From this decision the defendants appealed to the Lord Chancellor. (a)

Mr. Bethell, Mr. Roupell, and Mr. Glasse, in support of the appeal motion.

Mr. R. Palmer and Mr. H. W. Cole, for the plaintiff, in support of the injunction.

* The cases of *Cohen v. Wilkinson* (b) and *Blakemore v. The Glamorganshire Canal Navigation* (c) were cited in the course of the argument. * 156

(a) This case was heard before the Lord Chancellor at his private residence.

(b) *Ante*, Vol. I. p. 481.

(c) 1 M. & K. 154.

Without calling for a reply,

THE LORD CHANCELLOR. — I feel great difficulty and anxiety on this matter, because undoubtedly the principle laid down in the cases that have been referred to is one to which I must adhere ; nor do I see any ground for departing from the principle on which they have proceeded ; namely, that parties who have subscribed their money for one purpose are not to be told that the directors or a majority of the company are of the opinion that it would be very advantageous to employ it on another.¹ The difficulty, however, which I feel in this case is, whether the interference by way of injunction, which is the mode in which the Court exercises its jurisdiction to enforce an equity, is not counteracted by a counter equity on the other side ; for in many of these cases the interposition of the Court may produce the greatest possible injustice if the parties have not applied in time, but have permitted things to get into that state which makes the injunction not only a proceeding not enforcing an equity, but calculated to inflict great hardship and injustice.

Now what are the facts of this case ? I do not mean to go into a detail of dates, but it is clear that long ago every shareholder who took the trouble to inform himself of the state of the property in which he had embarked, must have been aware that the whole scheme could not be carried out. This was distinctly known * 157 * in November, 1848. Now the moment it was known that the whole scheme could not be carried out, the question arose whether the party who subscribed his money did or did not acquiesce in its being applied to carry out the works so far as the money would go. A considerable period of time has elapsed since that knowledge came to the plaintiff, and to every one of the parties who are represented by him in this suit ; and for this purpose it is immaterial whether they have paid their calls or not. From November, 1848, down to the time when the bill is filed, the company knowing they could not go on with the whole works, proceed to carry them on to a certain extent, lay out large sums of money, and of course come under liabilities in so doing. Was it not then the duty of those who meant to dispute this course of proceedings,

¹ See *The East Anglian Railways Co. v. The Eastern Counties Railway Co.*, 11 C. B. 775 ; 21 L. J. N. S. C. P. 23 ; 16 Jur. 249 ; *Colman v. The Eastern Counties Railway Co.*, 10 Beav. 15 ; *Salomons v. Laing*, 12 Beav. 352.

to make an application at once to a Court of Equity to prevent it? It seems to me that any member knowing that the company intended in the then state of their finances to go on with the works as far as they could, and not making such an application, thereby gave rise to a new equity against himself depriving him of the right to prevent the company from doing that which was contrary to the general rights of the shareholders. It is said, however, that there was a bill filed by Dumville, but that led to a compromise and can in no way affect the question. This case differs from any which has hitherto come before me; for in *Cohen v. Wilkinson*, (a) which has been referred to, that sort of acquiescence did not exist which is found here.

Mr. Bethell. — If your Lordship will forgive me for interposing; — In *Cohen v. Wilkinson* your Lordship expressed the very same view which you are now * taking: the statement * 158 in the report is, (b) “His Lordship concluded by observing that the only part of the case about which he entertained any doubt was the allegation at the bar, though nowhere apparent in the bill, that the plaintiff had been aware of and had acquiesced in the substituted undertaking. The plaintiff’s counsel then stated that this was the first time that such an allegation had been made, and that it was entirely unfounded. The Lord Chancellor thereupon ordered the appeal motion to be dismissed with costs.” And in another report of the same case, your Lordship is reported to have said, on the same point; “As there is no evidence of such alleged acquiescence, I must discharge the appeal motion with costs.”

THE LORD CHANCELLOR. — That would be the equity between the parties, because if those who have the management of the affairs of others depart from the regular course, and there is an acquiescence, the parties interested who have so acquiesced cannot afterwards complain. This creates the difficulty on the part of the plaintiff in the present case in associating himself with the whole body of shareholders; for at all events it is an answer to those on whose behalf the plaintiff sues, and it appears to me that the plaintiff himself has not removed the bar to the interference of the Court which arises from his own acquiescence. He knew what was

(a) *Ante*, Vol. I. p. 481.

(b) *Ante*, Vol. I. p. 487.

intended in November, 1848, and again when the company endeavoured to get the authority of Parliament to carry out part of their plan. It was their wish and intention to get the authority of Parliament, but having failed to obtain it, they went on with the works, thereby announcing to all concerned, that, although they * 159 had not * obtained the sanction of Parliament, they should proceed with the works, trusting to the acquiescence or the approbation of those who were interested in making the most of the property which they had acquired.

A great deal of care and discretion is always required in administering the jurisdiction of the Court in questions of injunction arising in cases of this sort. The object is to protect the interests of the parties ;¹ and whatever the situation of the parties may be, if the Court sees clearly that this interference, instead of protecting their interest, will tend to the ruin of the great body of those concerned, it will be very cautious in exercising its jurisdiction. Seeing that the works in the present case have proceeded as they have for some time, seeing the large expenditure that has been made, considering the nearness of the completion of the works and the comparatively small sum that will be required to complete them, how can it be supposed that anybody having a legitimate interest in the ultimate realization of profit from the works to be carried on, could derive any benefit from the injunction which has been granted ? If the injunction is continued, the result must be not only the loss of all the money that has been expended, but of the entire property : there will be an end of the concern, and every shareholder will lose the whole of his money. That is a consequence which the Court would be sorry should result from any order it might make, and I do not feel disposed to administer an equity from which such a consequence is likely to ensue.

But, on the other side, there is danger of permitting money to be laid out in a manner which originally was not contemplated by the Acts of Parliament. The question then is, whether those who are now complaining and suing in respect of their interest * 160 in this money, * have by their course of conduct precluded themselves from coming to a Court of Equity to keep the company strictly to that which was originally their right under

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1639, 1663, and notes and cases cited : *Murdock's Case*, 2 Bland, 461 ; 2 Seton (3d Eng. ed.), 874.

the Act. Assuming, however, that the parties knew, as they must have known, what the course of proceeding was, I consider that by not coming earlier they have precluded themselves from asking for the exercise of the extraordinary jurisdiction of this Court. On that ground, therefore, although it may be a matter of extreme delicacy with regard to cases that have been decided and which may hereafter arise to say what acquiescence is, I must refuse to interfere by injunction in this case.

Looking, however, to the facts now before me, when I find knowledge accessible to the plaintiff, and probably possessed by him, as to what must be the result, the failure of the original plan not arising from accident or any other cause that could be remedied, but being an actual failure caused by the state of the money market which placed the finances of the company in a position that rendered it hopeless that the whole scheme could be carried out, I must say it was the duty of the plaintiff, as soon as there was a manifestation of intention on the part of the company to carry on a work, which work must of necessity be of less extent than that originally contemplated, to have inquired into the matter, and, if necessary, to have applied and obtained the decision of a Court of Equity on the subject.

Besides this, it has not been suggested what possible remedy there could be for the expenditure that has been made. If the whole work were now stopped, and if, after the large sum already laid out, the works were never to be completed, ruin might be entailed upon a * great many people, without the least * 161 possibility of good arising to any one.¹ It is also to be considered that those whom the plaintiff represents, or some of them at least (although it may not be owing to their failure in particular calls that the work cannot be carried on to the full extent), are still defaulters in paying calls; and that as a body a large sum is due from them, which creates or tends to create the difficulty that is supposed to give rise to the jurisdiction of the Court.

Therefore, without feeling at all confident that the Master of the Rolls is not right in the conclusion to which he has come, I am bound to exercise the best discretion I can in reviewing his opinion; and upon the ground of acquiescence, I consider that the granting of the injunction is acting too stringently on an admitted

¹ See *Hodgson v. Earl of Powis*, 1 De G., M. & G. 11, 14.

rule. No doubt that rule should be acted upon in cases where it is properly applicable, but it must be mitigated and confined within those limits which the rights of the parties require. I decide nothing but that I think the circumstances of this case are such as to preclude the plaintiff from calling for the interposition of the Court, and that, therefore, the injunction must be dissolved.

Mr. R. Palmer. — Your Lordship has not adverted specifically to that part of the injunction which applies to the loan of the 200,000*l.*

THE LORD CHANCELLOR. — It does not appear that the money has been borrowed, and it is said that there is no intention of borrowing it. If, however, such an intention were manifested, I should grant an injunction. Therefore, under the present * 162 circumstances, and on the ground that one-half * of the capital is not paid up as the Act requires, I shall continue the injunction to that extent, for it cannot hurt anybody.

Mr. Bethell, referring to the 40th section of the 8 Vict. c. 16, submitted that the injunction was unnecessary, inasmuch as one-half of the capital not having been paid up, it was impossible for the company to borrow. He also asked for the costs of the application.

THE LORD CHANCELLOR, however, continued the injunction as to the 200,000*l.* until one-half of the capital had been paid up; discharged the order of the Master of the Rolls as to the other points; and made no order as to costs.

1850. June 25. Before The Lords Commissioners Lord LANGDALE and Mr. Baron ROLFE.

The Corporation of the Trinity House were empowered by the Act 6 & 7 Will. 4, c. 79, to purchase light-houses; and the Act directed that all the reasonable costs, charges, and expenses of reinvesting the purchase-money should be

borne by the corporation: *Held*, in the absence of any proof of an attempt to throw expense upon the corporation by an improper exercise of the power of reinvestment, that there was no limit to the number of separate investments, for the costs of which the corporation were liable.

UNDER compulsory powers for that purpose contained in the Act 6 & 7 Will. 4, c. 79, the Corporation of the Trinity House purchased the Skerries Light-house from the family of the plaintiff and other parties, for the sum of 444,984*l.* 11*s.* J. Jones, the plaintiff's uncle, was entitled to two-thirds of this sum, and, by his will, he devised the same in strict settlement. The plaintiff, an infant, was tenant for life of a moiety of the testator's interest in the purchase-money, which interest was represented by a sum of 141,660*l.* 10*s.* consols, which was carried to an account, "*Ex parte* the Corporation of the Trinity House and John Jones."

The 28th section of the Act 6 & 7 Will. 4, c. 79, enacts, that where by reason of any disability or incapacity of the person entitled to the light-house, the purchase-money shall be paid into the Bank of England, the Court may order "all the reasonable costs, charges, and expenses attending such purchase, or which may be incurred in consequence thereof, and also of the investment of the purchase-money in real or government securities, and likewise the reinvestment of such purchase-money or the government and real securities purchased therewith in the purchase of houses, buildings, lands, tenements, and hereditaments as hereinbefore mentioned, together with the costs, charges, and expenses of obtaining the proper orders and of the other * proceedings for such * 164 purposes, and of the payment of the dividends and interest of the said government or real securities and of the payment of the principal of the said purchase-money and of the government or real securities purchased therewith out of Court, to be paid, by the said master, wardens, and assistants, and the said master, wardens, and assistants shall from time to time pay such sums of money for such purposes as the said Court shall direct, out of the moneys applicable to the purposes of this Act."

In 1846, 96,000*l.*, part of the above sum of 141,660*l.* 10*s.* consols, was laid out in the purchase of certain property in the county of Cardigan, and in the same year a further sum of 12,000*l.* was in like manner laid out in the purchase of other and adjoining property. The Corporation of the Trinity House paid the costs of both these purchases. In 1848, a further sum of 4000*l.* was in-

vested in the purchase of another estate adjoining those previously purchased; and on the 15th August, 1849, a further sum of 15,500*l.* was similarly invested. On a petition by the plaintiff to confirm the Master's report approving of these last two purchases, the Vice-Chancellor KNIGHT BRUCE disallowed the costs, observing that the line must be drawn somewhere; that in the present case the corporation had paid the costs of two reinvestments, which, in his opinion, was sufficient; and that although it might be the most reasonable and advantageous course for a land-owner circumstanced as the infant was, to concentrate his property by successive purchases of adjacent fields, yet that the parliamentary purchaser ought not to be saddled with the costs of such reinvestments.

From this decision the plaintiff appealed to the Lords Commissioners.

* 165 * *Mr. Bacon* and *Mr. Pitman*, in support of the appeal petition, contended, that, in the absence of any thing like oppression or vexation in the conduct of those acting for the petitioner, there were no limits to the number of reinvestments with which the company ought to be charged. They relied upon the authorities of *In re The Merchant Tailors' Company*, (a) *Ex parte Bouverie*. (b)

Mr. Loftus Wigram, contra, submitted, that this was not a case in which the decision below could be varied on appeal, being one in which the Vice-Chancellor had exercised a mere discretionary power. He contended, that the only object contemplated by the provisions of the Act in question was to place a party whose lands were taken in as good a situation as he was before; that if no limit was to be imposed, there would be nothing to prevent reinvestment acre by acre; and that the particular circumstances of the present case were such as to have warranted the Vice-Chancellor in refusing to give the costs of any reinvestments after the first two, the purchase by the company being of a bare rock, quite unconnected with a residence or territorial associations.

Without calling for a reply,

THE LORD COMMISSIONER LORD LANGDALE.—There can be no doubt that in this case the petitioner is entitled to such costs as

(a) 10 Beav. 485.

(b) 4 Railway Cases, 229.

have been reasonably and properly incurred. The Act of Parliament upon which the question arises contains clauses very like those which are found in many other Acts upon which questions of a similar kind have very frequently arisen ; and I believe that in almost, if not in every case, the Court * has con- * 166 sidered that it is to have regard to the imperial powers conferred by the Act. These powers are exercised by taking from a man his property which he is unwilling to part with : they take it from him, and convert it into money ; and in cases where there are limitations of property, the Act directs that the money produced shall be reinvested. The present is a case of this kind, for I do not find that there is any distinction to be drawn between one species of landed property and another. Now it is not to be denied but that the direction as to costs may be taken advantage of in such a way as to occasion vexatious and unnecessary expense to the party on whom the burden is thrown ; and in such a case as that, I have never had the least doubt that, if it were made out, the Court would take care that the party attempting such a scheme should not be able to receive the profit of it, and would direct a restriction to be put upon the right which he has under the Act of Parliament, and which is to be exercised and put in force by this Court. But then a case of vexation must be made out ; and the question now is, whether the party here has improperly used the power given by the Act for the purpose of throwing expense unnecessarily on the other party. What, then, are the facts of this case ? A sum of 141,000*l.* is obtained as compensation for real property, a light-house, and paid into Court because of the incapacity of the person to whom it belonged to deal with it. The Act of Parliament provides, — [His Lordship here read the 28th section.]

The question really is, are the costs now in dispute to be called unreasonable because in reinvesting no less a sum than 141,000*l.*, particular sums of money not exhausting the whole fund have been invested separately. The first was a sum of 96,000*l.*, the second 12,000*l.*, the third 4,000*l.*, and the fourth 15,500*l.* I * cannot find that any thing is said to show that these sepa- * 167 rate investments were made for any improper purpose, or to throw the costs on the Trinity House unreasonably. That is not alleged ; but it is said the investment might have been made in two sums, and that if the party is only entitled to reasonable costs,

charges, and expenses, he ought to be allowed the costs of two transactions and no more. I confess I cannot see that that is or ought to be considered as a general rule to be acted on, or that because this is a light-house (a particular species of property), the party is to be reduced to the necessity of making the investment in two transactions, or not to have the costs, charges, and expenses which the Act of Parliament gives him. If it could be made out that the party here had acted merely for his own pleasure or amusement, and that he was attempting to throw the expense of thus acting on the Trinity House, I should in such a case think that there ought to be interference by this Court against him; but no such case has been made out, and therefore I think the costs in question ought to be allowed.

THE LORD COMMISSIONER MR. BARON ROLFE. — I think this case falls within the principle laid down by Lord LANGDALE, in the case cited from the 10th Beavan. It is true that in the Act of Parliament in that case the direction was that "all costs" were to be paid, and that it is not so here: it is here "all reasonable costs;" but I think that is a distinction without a difference, because "all costs" would in the language of the legislature imply all reasonable costs. But it was contended that this is a case within the discretion of the Judge, and not properly the subject of appeal.

I do not, however, think that this is so. If the Act of Parliament had said that the costs of so many * purchases as the Judge should think reasonable should be paid, and the Judge had said that he thought five were reasonable, or that six were reasonable, it might then be that this Court would refuse to discuss the present question; but that is not the case here.

I think the learned Vice-Chancellor has proceeded on an erroneous principle; and I can see no limit to the costs to be allowed, except an unreasonable exercise of the direction to invest on the part of those acting upon it. This is not suggested, and on the contrary his Honor is reported to have said that he supposed the parties had acted *bonâ fide*. If that is so, and as Lord LANGDALE remarks the imperial power has taken from the individual something which he had before and has substituted a sum of money to be reinvested, I think the Trinity House must pay all the costs of so reasonably reinvesting, otherwise they do not put the owner of the property in the same position that he was in before the property was taken from him.

* In the Matter of The MADRID and VALENCIA Railway Company, and of The JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 and 1849. * 169

Ex parte TURNER.¹

Ex parte JAMES.

1850. January 17. June 26.

A company formed for making a railway in Spain, one-third of the capital of which was appropriated to Spanish subscribers, was conducted by a board of directors in London assisted by a committee at Madrid: *Held*, that this was an English company, and within the provisions of the Winding-up Acts.² In this case it appeared that the money subscribed by the Spanish shareholders had been returned: *Held*, that such a reduction of the capital was a sufficient ground for winding up the company.³

By the prospectus of the Madrid and Valencia Railway Company, which was a joint-stock company registered in England and formed for the purpose of making a railway from Madrid to Valencia, it was provided that the capital of the company should be 2400,000*l.* in 120,000 shares of 20*l.* each; that one-third of the shares should be ceded to Spain; that the *locale* of the company should be in that country; that the company should be formed on the principle of a *Compania Anonima* agreeably to the commercial code of Spain; that the affairs of the company should be conducted by a board of directors in London, assisted by a committee at Madrid.

The undertaking having failed and become abortive, some of the shareholders in England were desirous to wind up the affairs of the company, and on the 20th December, 1849, the usual order was made by the Vice-Chancellor KNIGHT BRUCE on the separate petitions of John Turner and Henry James (one order being made on both petitions).

From this order (which was not actually drawn up) the chair-

¹ S. C., 3 De G. & S. 127.

² See 2 Lindley Partn. (Eng. ed. 1860), 1044; *Ex parte* Chippendale, 2 De G., M. & G. 19; *Barclay's Case*, 26 Beav. 177; *Ex parte* Wolesey, 3 De G. & S. 101; *Ex parte* Moss, 14 Jur. 754; *In re* Commercial Bank of India, L. R. 6 Eq. 517.

³ See 2 Lindley Partn. (Eng. ed. 1860), 1053, 1054; *In re* Suburban Hotel Co., L. R. 2 Ch. Ap. 737.

man and certain directors, who were desirous of continuing the company, appealed to the Lord Chancellor.

* 170 * The facts of the case and the argument before the Vice-Chancellor are fully reported in the 3d volume of Messrs. De Gex and Smale's Reports, page 127. The following brief statement is, however, necessary in order to explain one or two matters referred to in the judgment of the Lord Chancellor.

By special conditions inserted in a royal ordinance of the Queen of Spain authorizing the operations of the company in Spain, a deposit was to be made within a limited time in a Spanish bank, and another deposit was to be made in the Bank of England, which latter deposit was to be forfeited to the State of Spain, if the deposit in the Spanish bank should not be made. It appeared from the evidence that 30,712*l.* had been accordingly deposited in the Bank of England in the name of the Spanish ambassador. It also appeared that the Spanish directors had discontinued any attempt to carry out the purposes of the company, and had actually returned to the Spanish subscribers the amounts of their deposits, thus in effect reducing the capital of the company by one-third.

Mr. Russell and *Mr. Glasse*, in support of the appeal, contended that the company was a Spanish company, and did not therefore fall under the provisions of the Winding-up Act.

[THE LORD CHANCELLOR. — Do you mean to say that no company is within the provisions of the Act whose sphere of operation is out of Great Britain? This is clearly an English company, though, like the General Steam Navigation and other companies, it operates chiefly out of this country.]

* 171 * They further contended that there was no sufficient abandonment of the intended operations of the company.

[THE LORD CHANCELLOR. — Take the fact to be that the money of the Spanish subscribers has been returned, can it be said that the company is to prosecute the undertaking with English capital only?]

They also urged that by winding up the company the sum deposited in the Bank of England would become forfeited.

Mr. Bacon, Mr. Welford, and Mr. Logie, appeared for Henry James.

Mr. Malins and Mr. J. H. Palmer appeared for John Turner. .

The counsel for H. James and J. Turner were not called on by the Lord Chancellor.

THE LORD CHANCELLOR. — I am clearly of opinion that this is an English company, and within the provisions of the Winding-up Act. The evidence shows a cessation of business on the part of the company. The substance of the undertaking is in Spain, and it appears that there the parties have come to the resolution of discontinuing it, and have returned the money to the subscribers. The company cannot, therefore, in that country go on with their works, and they have also reduced their capital by one-third. Can they be justified in going on after this? This act of reducing the capital by one-third is of itself sufficient to bring the company within the Act. A question, however, may arise, how far winding up the * company here may endanger the deposit; * 172 and it also appears that the parties applying have been offered all they have subscribed.

Some discussion here took place as to the offer referred to by the Lord Chancellor, it not having been apparently understood that such an offer had been made. It was however now repeated on behalf of the parties appealing, and thereupon the Lord Chancellor made an order to the following effect: —

The appellants, by their counsel, offering to pay the respondents Henry James and John Turner the full amount of all sums paid by the said Henry James and John Turner in respect of deposits on their respective shares in the company in their several petitions mentioned, and also all costs properly incurred by them respectively in obtaining the order of the 20th December, 1849, and of this application, and relating thereto; let it be referred to the Master to ascertain the said costs; and upon payment by the appellants to Henry James and John Turner respectively, within a fortnight from the date of the Master's certificate, of the amount of the said respective deposits and costs, let the order of the 20th December, 1849, be discharged, and the petitions presented by the said Henry James and John Turner withdrawn.

June 26. Before the Lords Commissioners Lord LANGDALE and Mr. Baron ROLFE.

The Master having, in pursuance of the above order, and on the 18th March, 1850, certified the amount due for costs, but neither the same nor the deposits having been paid by the appealing parties, the original order of the Vice-Chancellor for winding up the company was drawn up, and the Master proceeded to act under the same, and made an order appointing an interim manager in the usual course.

On the 25th April, 1850, the appealing parties moved before the Vice-Chancellor KNIGHT BRUCE to discharge this order of the Master, but his Honor, under the circumstances of the case, refused to interfere.

The respondents H. James and J. Turner now moved before the Lords Commissioners of the Great Seal, that the appeal motion against the order of the Vice-Chancellor of the 20th December, 1849, might be discharged with costs; that the appealing parties might pay to the respondents their costs occasioned by or incurred in consequence of the undertaking or offer and the default in performance thereof, and of the present application.

THE LORDS COMMISSIONERS LORD LANGDALE and Mr. BARON ROLFE, after hearing counsel for the several parties, held, that the condition not having been performed, the order of the Vice-Chancellor remained undischarged, and that all further stay of proceedings under it was at an end; that therefore the parties were in precisely the same position as when the appeal from that order was presented to the Lord Chancellor; and that in respect of the costs incurred it was right that all such as arose from the non-performance of the condition should be borne by the appellants. Their Lordships however refused on the present occasion to deal in any way whatever with the appeal motion.

* In the Matter of MARGARET STARK or FERGUSON, * 174
Widow, a Lunatic residing in Scotland.

AND

In the Matter of the Acts 1 & 2 Geo. 4, c. 15, and 1 Will. 4, c. 65.

1850. January 25. July 5.

Application by the curator bonis of a Scotch lunatic for the transfer of stock standing in the lunatic's name in the Bank of England refused; the Lord Chancellor not being satisfied that the security given by the curator in Scotland was sufficient, and holding that it was a matter of discretion to refuse or accede to the application.

Terms of order of reference to the Master in such a case, the decret of the Scotch Court appointing the curator not being sufficient to establish the lunacy under the terms of the Acts 1 & 2 Geo. 4, c. 15, and 1 Will. 4, c. 65.

THIS was the petition, supported by affidavit, of Robert Spottiswoode of the city of Edinburgh, stating that he had been appointed by the Court of Session in Scotland curator bonis of the lunatic's estate, and praying under the authority of the above Acts a transfer of a sum of 4005*l.* consols standing in the lunatic's name at the Bank of England with the dividends thereon to him as such curator; and that he might be at liberty to retain the costs of this application thereout.

Mr. J. Baily, for the petition, referred to the decret of the Court in Scotland, whereby the petitioner was appointed curator, and which he submitted was equivalent to a declaration of lunacy.

THE LORD CHANCELLOR, however, declined to make the order as prayed in the first instance, observing that the evidence furnished by the decret fell short of establishing the lunacy under the terms of the Acts. His Lordship accordingly directed a reference to inquire whether *M. Stark* or *Ferguson* had been found lunatic according to the laws of the place where she was resident; whether the stock formed part of her personal estate; and whether the petitioner had been * duly appointed curator bonis, and * 175 had given security accordingly, and was properly qualified to have the stock transferred to him.

July 5. Before the Lords Commissioners Lord LANGDALE and Mr. Baron ROLFE.

The Master by his report, dated the 12th April, 1850, found in the affirmative as to all the matters inquired after. He stated the various proceedings which had taken place in Scotland, that the curator had given the usual security for the due performance of his office, and that the probable amount of the annual intromissions would be 210*l*. He also stated the opinion of a Scotch advocate, to the effect that the curator having given such security was properly qualified and authorized, according to the laws of Scotland, to have any sum of bank stock which might be then standing in the name of the lunatic in the books of the governor and company of the Bank of England and forming part of the personal estate, and the dividends thereof, transferred and paid to him.

Mr. J. Baily, for the petitioner, now asked for a confirmation of this report, and a transfer of the stock.

THE LORD COMMISSIONER LORD LANGDALE referred to a case of *In re Morgan*, (a) in which, under similar circumstances, the Lord Chancellor (COTTENHAM) had refused an application like the present, holding that the Act 1 Will. 4, c. 65 left it in his discretion to grant or refuse such an application.

His Lordship then added, that, in conformity with this *176 precedent, so large a sum as that mentioned in *the present petition ought not to be transferred to the curator on the security stated by the Master's report to have been given, especially as no reason was assigned for the transfer.

An order was therefore made confirming the Master's report, and directing the payment of the dividends only of the stock to the curator.

(a) Before the Lord Chancellor, March 23, and April 27, 1849.

In the Matter of The DIRECT EXETER, PLYMOUTH, and DEVONPORT Railway Company, and of the JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 and 1849.

Ex parte W. H. BESLEY.¹

1850. June 5.

A. B., one of the Provisional Committee of a joint-stock company, became desirous of withdrawing. He thereupon declined to take the shares proposed to be allotted to him as a Provisional Committee-man, and gave authority to the secretary of the company to withdraw his name from the list of the Provisional Committee. This authority was not acted upon, and the name of A. B. continued on the list of the Provisional Committee. No shares were allotted to him, but he subsequently attended meetings of the Provisional Committee, and paid various sums of money in pursuance of resolutions passed at those meetings towards liquidating the liabilities of the company. *Held*, under these circumstances, and without deciding the question whether the mere fact of being a Provisional Committee-man would have subjected him to any liability, that the name of A. B. was rightly inserted in the list of contributories of the company.

THE question in this case was, whether the name of William Henry Besley should be inserted in the list of the contributories of the above company which was being wound up under the provisions of the Joint-stock Companies Winding-up Acts. The following are the facts which were proved in evidence, and on which the determination of this question depended.

The company being provisionally registered under the Act 7 & 8 Vict. c. 110, W. H. Besley was, in the *month *177 of October, 1845, solicited by one of the Provisional Committee to allow his name to be added as a member of the committee. To this proposal W. H. Besley verbally assented, on the

¹ S. C., 2 H. & T. 375. This case occurs three times in the books. It was first decided by Vice-Chancellor KNIGHT BRUCE (Besley's Case, 3 De G. & S. 224), who held that Besley was not a contributory. This decision was appealed against, and was reversed by Lord COTTENHAM in the principal case. But the appeal was reheard by Lord TRURO, who affirmed the decision of the Vice-Chancellor, 3 M'N. & G. 287. The case as reported in 3 De G. & S. 224, and in 3 M'N. & G. 287, is still law. See the remarks of Lord BROUGHAM on Besley's Case, in *Norris v. Cottle*, 2 H. L. 647, and in *Hutton v. Upfill*, 2 H. L. 674; *Bright v. Hutton*, and *Hutton v. Bright*, 3 H. L. 341; 2 Lindley Partn. (Eng. ed. 1860) 1117 *et seq.*

assurance, as he stated in his affidavit, that by so doing he would not incur any responsibility, or be bound to take shares in the company. The name of W. H. Besley was accordingly added to the Provisional Committee by a resolution passed at the first meeting of the committee, which took place on the 4th October, 1845. The second meeting of the Provisional Committee took place on the 7th October, 1845, W. H. Besley not being present; and at this meeting a committee of management was appointed. On the 3d November, 1845, a resolution was passed at a meeting of the Managing Committee relative to the allotment of shares about to be made to the members of the Provisional Committee, and a copy of this resolution was sent to W. H. Besley.

On the 6th November, 1845, W. H. Besley wrote to the secretary of the company, intimating that it would not be convenient for him to take up the shares which were allotted to him as one of the Provisional Committee, and therefore requesting that his name might be taken from the list. This letter was in the following terms: "47 Southernhay, 6th November, 1845. Sir, — I find it will not be quite convenient for me to take up the shares which are allotted to me as one of the Provisional Committee of the Direct Exeter, Plymouth, and Devonport Railway. I must, therefore, request that my name be taken from the list; and I give you this early intimation that I may be no obstacle to the shares being allotted to another person. I am, sir, your obedient servant,
Wm. Hy. Besley."

* 178 * The only notice taken of this letter was a resolution of the Managing Committee on the 7th November, 1845, directing the secretary to inform W. H. Besley and other parties, who had acted in a similar manner, that their wish should be complied with. The secretary, however, did not make this communication to W. H. Besley, and his name accordingly continued on the list of the Provisional Committee. The Managing Committee held meetings and conducted the business of the company; but it having at last become apparent that the undertaking could not be proceeded with, the Managing Committee, at a meeting held on the 27th December, 1845, passed a resolution to call a meeting of the Provisional Committee on the 31st December, 1845.

In consequence of this resolution a meeting of the Provisional Committee (being their third meeting) took place on the 31st December, 1845, when a report of the Managing Committee on

the affairs of the company was received, approved, and adopted, and the thanks of the meeting were given to the Managing Committee for the manner in which they had conducted the affairs of the company. A resolution was also passed that the Provisional Committee should pay, on or before the 10th January then next, the sum of three shillings per share on one hundred shares each, to meet the liabilities of the company. It appeared from the resolution book of the Provisional Committee that W. H. Besley was present at this meeting, but he stated in his affidavit that he was not present until all the resolutions had been passed.

A copy of the resolution as to the payment was sent to W. H. Besley and the other members of the Provisional Committee; and on the 14th January, 1846, W. H. Besley paid 15*l.*, being the amount required by * the resolution. On the 19th Janu- * 179
ary, 1846, he signed an agreement for mutual protection as between himself and the other members of the Provisional Committee.

On the 2d March, 1846, another meeting of the Provisional Committee was held, W. H. Besley being present, at which the following among other resolutions were passed: "That the committee present are of opinion that a contribution of 65*l.*, including the former payment of 15*l.*, be required from each member of the Provisional Committee;" "that an application be made by the solicitors to each member of the Provisional and Managing Committee for an additional 50*l.* to be paid into the Exeter Bank;" "that the solicitors inform each member of the Provisional Committee that unless 65*l.* be paid on or before Wednesday, the 18th March, their names will be handed over to the creditors."

On the 25th March, 1846, W. H. Besley paid 50*l.* in pursuance of these resolutions. On the 31st August, 1846, another meeting of the Provisional Committee was held, at which W. H. Besley was present, and the following among other resolutions were passed: "That the members who are here present agree to pay the sum of fifty pounds or such other sum as will make up with previous payments one hundred and fifteen pounds, and they determine by every influence and power they possess to resist or prevent any further demand being made upon such persons as have contributed one hundred and fifteen pounds;" "that Mr. Floud be requested immediately to cause the creditors of the company to apply to such Provisional Committee-men, and enforce payment

from such as have not paid their respective contributions, in order to wind up the affairs of this undertaking as soon as possible."

* 180 * On the 27th September, 1846, and in pursuance of these resolutions, W. H. Besley paid 50*l.*, which being added to his former payments, of 50*l.* on the 25th March, 1846, and 15*l.* on the 14th January, 1846, made up the total sum of 115*l.*

Under these circumstances, and on the company being wound up under the provisions of the Joint-stock Companies Winding-up Acts, 1848 and 1849, the Master held that the name of W. H. Besley was rightly placed by the official manager on the list of contributories. The case was then brought before the Vice-Chancellor KNIGHT BRUCE, who made an order, dated the 30th May, 1850, ordering the name of W. H. Besley to be removed from the list.

From this decision the official manager now appealed to the Lord Chancellor.

Mr. Roxburgh, for the official manager, cited the following cases: *Ex parte Holinsworth*, (a) *Parbury's Case*, (b) *The Earl of Mansfield's Case*, (c) *Ex parte, Cooke*, (d) *Ex parte Morgan*. (e)

Mr. Karlake, for W. H. Besley, did not deny the fact of W. H. Besley having been a member of the Provisional Committee, but contended that this did not render him liable, and that the payments made by him could not have that effect. He further contended that W. H. Besley was not the member of a company within the meaning of the Winding-up Act; that the Provisional Committee did not form a company, but were simply a body

* 181 of persons desirous of bringing about the formation * of a company; that to such an association or body of persons the provisions of the Winding-up Act did not apply.

[THE LORD CHANCELLOR. — Does not the Winding-up Act assume that every association shall come within the term company; so that

(a) 5 *Railway Cases*, 623; S. C., 3 De G. & S. 7.

(b) 3 De G. & S. 43.

(c) Since reported, *ante*, p. 57.

(d) 3 De G. & S. 148.

(e) *Ante*, Vol. I. p. 225.

whether it is called a Provisional Committee, or by any other name, if certain functions are assumed, it is a company within the meaning of the Act.]

He cited the following cases: *Reynell v. Lewis and Wyld v. Hopkins*, (a) *Bell v. Lord Mexborough*, (b) *Newton v. Belcher*, (c) *Bailey v. Macaulay*. (d)

Mr. Roxburgh, in reply. (e)

THE LORD CHANCELLOR. — I cannot for a moment entertain the idea that this company had not advanced to that state which made * it the proper subject of an order under the Winding- * 182 up Act. It may be quite right to draw within the operation of the Act associations or companies of this kind, for such an association may require the aid of the Act just as much as if it had gone on further. Whether in this case you call it a company or an association, or any other name, is quite immaterial, because it is a company in fact: it has become a company within the meaning of the Winding-up Act, and as such the Court has power to wind up its affairs.

The only question is, whether the gentleman whose name was in this case placed by the official manager on the list of contributories, has or has not rendered himself liable as a contributory to any part of the expense incurred in this association, commencing in a Provisional Committee who appoint a committee of management, and afterwards, finding it cannot proceed, going before the Master to have its affairs wound up.

The facts which appear before me are these, that Mr. Besley was

(a) 15 M. & W. 517.

(b) 5 Railway Cases, 149.

(c) Before the Queen's Bench, November 25, 1848.

(d) Before the Queen's Bench, July 5, and 11, 1849. [13 Q. B. 815.]

(e) In the course of the hearing, the Lord Chancellor made observations upon the subject of the liability of Provisional Committee-men and other matters referred to by counsel. It has, however, appeared better not to introduce these observations into the report, as they had no direct bearing on the case as treated by his Lordship in his judgment, and would hardly be rightly understood, without also introducing at great length the arguments of counsel which gave occasion to them. That the observations in question could not, with propriety, be reported as deciding any point, will be seen by reference to the remarks made on this case by the Lords Commissioners in giving judgment in *Ex parte Roberts*, *post*, p. 196. Remarks to a similar effect were also made by Lord BROUGHAM in moving the judgment of the House of Lords, in *Ex parte Cottle*, August 9, 1850.

originally ostensibly a member, and that he consented to his name being put down as a member of the committee for the purpose of instituting this company. At a subsequent period he was desirous, according to his own statement, of withdrawing. By some means or other he had ascertained that shares were or would be allotted to him, and he gave notice that he did not want shares, and that he wished to withdraw, and he gave authority to the secretary to withdraw his name. That authority was not acted upon: at any rate his name remained, and remained until the last moment on the list as that of a member of the Provisional Committee. Then in the mean time things go on; the Provisional Committee appoint a committee of management, and the expenses which are incidental to the commencement of such * proceedings are necessarily incurred, and other expenses arise. Mr. Besley remains a Provisional Committee-man. It is not necessary to consider the question, whether that mere fact without more would make him liable to anybody. The case does not require any observation on that part of it, because there is so much more as to render it unnecessary to consider what the effect of that would be. But Mr. Besley does remain as a Provisional Committee-man; he attends meetings of the Provisional Committee; the Provisional Committee appoints a Managing Committee; the Managing Committee reports on the expenses incurred; he concurs in an order for the purpose of liquidating those expenses, and pays his share. He goes on allowing his name to remain on the list of the Provisional Committee, and although I cannot say that he was under any mistake as to the course he adopted when he found his name was not withdrawn, yet I cannot help being struck with the fact, that, after he knew his name remained there, he did not take any further course to get his name off. But then comes this fact: it is by his name remaining on the list coupled with the circumstance of his knowing it, that his liability arose, and he acts on that liability and pays. Why did he pay? Was he conscious that his apparent liability arose merely because his order had not been carried into effect? No such statement appears; but there is the fact of his agreeing to pay a proportion of the expenses. I cannot have better authority for saying he is liable, than his own act. It is not an act in mere ignorance of the law; but it is an admission of facts which, if established one way, would show his liability to be considered a contributory beyond all question. In that view it is that the fact

of payment becomes important; he recognizes circumstances which under any view of the law would render him liable to contribute, and I do not know that any thing can be more dangerous * than when a man's overt acts show an acknowledgment * 184 of a liability to permit him to say that he acted under a false impression of the law. No such impression however appeared to operate on Mr. Besley's mind at the time, but, on the contrary, all the facts show that he considered he was so far connected with the company as to render him liable to some extent to pay.

Looking then at the words of the Act, I think he falls within the description of the Act, and that the Master was right in including him in the list of contributories; and, therefore, that the Vice-Chancellor's order was wrong in striking him off. (a)

* In the Matter of The WOLVERHAMPTON, CHESTER, * 185 and BIRKENHEAD JUNCTION Railway Company, and of The JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 and 1849.

Ex parte COTTLE.

1850. June 20. July 15. Before The Lords Commissioners Lord LANGDALE and Mr. Baron ROLFE.

The mere fact of being on the Provisional Committee of a company, does not make a party a joint contractor with those who act and make contracts, and therefore does not render him liable as a contributory within the meaning of the Winding-up Acts.¹

THIS was an appeal from the decision of the Vice-Chancellor of England, whereby J. M. Cottle was placed on the list of contributories of the above company under the following circumstances.

It appeared in evidence before the Master, that J. M. Cottle had, by letter of the 26th September, 1845, allowed his name to be

(a) This case was heard by the Lord Chancellor at his private residence, but the reporters have been kindly supplied with the means of publishing the above report.

¹ See *Norris v. Cottle*, 2 H. L. 647, affirming the decision in this case; 2 *Lindley Partn.* (Eng. ed. 1860) 1116 *et seq.*; *Bright v. Hutton*, *Hutton v. Bright*, 3 H. L. 341; *Oakes v. Turquand*, L. R. 2 H. L. 325, 331; *Hutton v. Thompson*, and *Norris v. Cooper*, 3 H. L. 161; *Hamilton v. Smith*, 7 W. R. 173.

placed on the Provisional Committee of the company, and that he was advertised as a Provisional Committee-man; that he did not however apply for or accept any shares in the company; and that he did not attend the meetings or otherwise act in the affairs of the company. It further appeared, that by a minute of the committee, on the 10th October, 1845, it was resolved that every Provisional Committee-man was to be entitled to one hundred shares, but was to hold twenty-five shares to qualify him for his office; that the usual allotment letter allotting these twenty-five shares to J. M. Cottle had been sent to him, signed by the solicitor and secretary of the company, but that he, J. M. Cottle, never took these or any other shares.

On this evidence the Master excluded the name of J. M. Cottle from the list of contributories; and the Vice-Chancellor *186 having, on the 26th April, 1850, reversed *that decision, J. M. Cottle now appealed to the Lord Chancellor.

Mr. Rolt and *Mr. W. M. James*, in support of the appeal motion. J. M. Cottle is neither a member nor a contributory within the definition of these terms in the 3d section of the Winding-up Act (11 & 12 Vict. c. 45). The words "otherwise howsoever," at the end of the clause defining the word "contributory," mean if the party is in any way liable to contribute. The word "contributory" implies a co-liability to pay the debt of a common creditor; and unless a party can be fixed with such liability, he is in no sense a contributory. The question then is, has the party in this case held himself out to the world as a member? The mere fact that he consented to become a Provisional Committee-man is not sufficient to constitute a liability, for such an agreement does not intend a participation in profit and loss. *Reynell v. Lewis* and *Wyld v. Hopkins*. (a) Assuming for a moment that he is a contributory, how is the extent of his liability to be ascertained between the other shareholders and himself? *Ex parte Besley* (b) will be relied on by the other side; but that case is distinguishable from the present, for there there were overt acts of partnership, such as payment of calls and attendance at meetings. In the present instance the party has done no act from which a partnership could be inferred. In *Reynell v. Lewis* and *Wyld v. Hopkins*, (a) POLLOCK C. B. says, "The agreement to become a

(a) 15 M. & W. 517.

(b) Since reported, *ante*, p. 176.

Provisional Committee-man, means neither more nor less than what the words express; viz., an agreement to act on the Provisional Committee in carrying into effect the preliminary arrangements for petitioning Parliament for a bill, and so to promote the scheme."

* *Mr. R. Palmer and Mr. Glasse, contra.* — It is clearly * 187 settled that the legal liability to creditors is not the test of liability to be placed on the list of contributories. The question in such cases is, whether a party is liable to contribute to the payment, not whether he is liable to the payment, of a particular debt. In a creditor's action the question of contribution never is, nor can be, raised; and it is only under the provisions of the Winding-up Acts that the amount of liability of shareholders *inter se* can be adjusted. At law, the point to be ascertained is to whom the plaintiff has given credit; and thus, where trustees carry on a trade, the *cestui que trusts* cannot be reached. This is an answer to the argument that, in order to fix a party as a contributory, there must be shown to be a co-liability to creditors. One question decided in *Reynell v. Lewis* and *Wyld v. Hopkins* (a) was, that companies such as this were not partnerships at law; but they have been judicially decided to be within the Winding-up Act (11 & 12 Vict. c. 45), *Ex parte Barber*; (b) and they are now, by the subsequent Act (12 & 13 Vict. c. 108), expressly declared so to be. In the present case one positive act is proved before the Master, necessarily involving an expense for which the appellant may be liable jointly with the other members; namely, the advertisement in which his name appeared as a Provisional Committee-man. It is immaterial whether or not he may be primarily liable. Provided he is in any degree liable, he is rightly placed on the list of contributories. *Ex parte Hawthorn*, (c) *Ex parte Earl of Mansfield*, (d) *Ex parte Besley*. (e) It is not necessary to have shares in order to bring a party within the scope of the Winding-up Acts. Thus a * member of the Managing Committee * 188 who had declined to take shares, was held entitled to have a company wound up: *Ex parte Cooke*; (g) so also a Provisional Committee-man, who with others had incurred liability with refer-

(a) 15 M. & W. 517.

(d) Since reported, *ante*, p. 57.(b) *Ante*, Vol. I. p. 176.(e) Since reported, *ante*, p. 176.(c) *Ante*, Vol. I. p. 49.

(g) 3 De G. & S. 148.

ence to an intended line of railway. *Ex parte Holinsworth*. (a)
[They also referred to *Parbury's Case*. (b)]

Mr. Rolt, in reply. — The argument on the other side is, that without either being a member, or having held himself out to the public as a member, there may nevertheless be some other liability by contract express or implied between J. M. Cottle and the other members, to contribute to the debts to which the company might become liable. This, however, must be clearly proved, and a contract to guarantee cannot be implied at law, nor has a committee-man any authority to use the name of a co-committee-man so as to bind him. *Reynell v. Lewis* and *Wyld v. Hopkins*. (c) The case of *Ex parte Hawthorn* (d) is inapplicable, for there there was an actual though a remote liability, but here we contend that there is no liability whatever. The test of liability to contribution is liability to the plaintiff at law: *Lefroy v. Gore*; (e) and in the case of *Bell v. Lord Mexborough*, (g) Lord COTTENHAM says, "It can never be that rights are construed differently in the courts of law and in these courts."

July 15.

THE LORD COMMISSIONER MR. BARON ROLFE now delivered the judgment of the Court as follows: In this case the Master * 189 had excluded the name of * Mr. Cottle from the list of contributories, but his Honor the Vice-Chancellor of England on a motion by the official manager, overruled the judgment of the Master, and ordered Mr. Cottle's name to be included among the contributories.

The facts of this case were as follow: By a letter of the 26th of September, 1845, Mr. Cottle agreed to allow his name to be placed on the Provisional Committee, and it was accordingly inserted in the list which was advertised in the ordinary mode. Mr. Cottle never attended any meeting, nor applied for any shares, nor in fact did any thing whatever, except thus giving authority to put his name on the list of the Provisional Committee. By a minute of the committee made on the 10th of October, 1845, and entered

(a) 5 Railway Cases, 623; S. C., 3 De G. & S. 7.

(b) 3 De G. & S. 43.

(c) 1 Jones & Lat. 571.

(e) 15 M. & W. 517.

(g) 5 Railway Cases, 149.

(d) *Ante*, Vol. I. p. 176.

in the company's minute-book, it was resolved, "That every Provisional Committee-man should be entitled to have one hundred shares, but should hold twenty-five shares to qualify him for his office." This resolution does not appear to have been made known to Mr. Cottle, except that by a letter dated the 20th of November, 1845, and addressed to him by the solicitor and secretary, he was informed that the committee of management had allotted to him twenty-five shares, and directions were given to him as to the payments he was to make and the steps he was to take in order to make these shares available. The letter stated the shares to have been allotted to Mr. Cottle in compliance with his application; but no such application had in fact been made, and Mr. Cottle paid no attention whatever to the letter. His Honor the Vice-Chancellor of England, in ordering Mr. Cottle's name to be placed on the list, stated that he founded his judgment on the ground that, by allowing his name to stand on the Provisional Committee,

* Mr. Cottle became liable *in foro conscientie* to contribute * 190 ratably with the other members of that body; and again his Honor says, that, while Mr. Cottle allowed his name to stand on the Provisional Committee, he might become liable to the consequences of any order that a Provisional Committee-man might give.

We feel compelled to dissent altogether from this view of the law. The cases of *Reynell v. Lewis* and *Wyld v. Hopkins (a)* establish conclusively, that at law a person, by authorizing his name to be placed on the Provisional Committee, gives no authority to any other member of the committee to enter into any contract whatever.¹ All that a person does by becoming a member of a Provisional Committee is to signify his approbation of the scheme, and to engage that he will concur with the others in such acts as he may approve of, and may think conducive to the objects in view. If, indeed, he expressly or impliedly gives authority to any one or more of the committee to act for him, then whatever is done in pursuance of that authority is of course obligatory on him; in such a case, if goods are purchased, he may be sued by the seller, or, if work is done, he may be sued by the party who has done the work; and if any other committee-man jointly liable with him has

(a) 15 M. & W. 517.

¹ See *Bailey v. Macaulay*, *Bailey v. Pearson*, *Bailey v. Haines*, *Bailey v. Bracebridge*, *Dawson v. Hay*, and *Wilson v. Holden*, 13 Q. B. 815.

paid for the goods, or for the work, he may be sued by that party for contribution. But the result of the two cases at law to which we have referred (and very many cases have since been decided on the same principle) is, that the mere fact of becoming a member of a Provisional Committee gives no authority whatever to any one. It was, indeed, argued before us, that although a person by being on a Provisional Committee does not make himself

* 191 liable to third persons * for dealings between them and other members of the committee, yet, that he does become liable, as between himself and such other members, to contribute ratably in respect of their outlay. But this is an entire fallacy. The obligation to contribute is a legal obligation, and may be enforced by action at law, though often far more conveniently in equity, and the obligation in the case of several persons jointly contracting for their common benefit arises from an implied contract on the part of every joint contractor to pay his share of the joint expense. But when once it is established, that the mere fact of being on the Provisional Committee does not make a party to be a joint contractor with those who act and make contracts, the whole substratum fails. There is no joint contract, and so no liability to contribute.

On these grounds, we feel bound to differ from the Vice-Chancellor of England, and to say that Mr. Cottle did not become liable to contribute to any of the expenses incurred; and the order placing him on the list must, therefore, be discharged. (*a*)

* 192 * In the Matter of The DIRECT EXETER, PLYMOUTH, and DEVONPORT Railway Company, and of The JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 and 1849.

Ex parte ROBERTS.

July 4, 15. Before the Lords Commissioners Lord LANGDALE and Mr. Baron ROLFE.

A. B., in a letter assenting to become one of the Provisional Committee of a railway company, expressly stated that this assent was to be taken subject to his approval of the plans and course of the line when definitively fixed upon,

(*a*) This decision was affirmed on appeal by the House of Lords, August 9, 1850 [Norris v. Cottle, 2 H. L. Cas. 647.]

and so that he should be held free from all liabilities. His name was thereupon inserted in the list of the Provisional Committee; and he attended two meetings of the committee, but took no part whatever in the proceedings. At one of these meetings a committee of management was appointed. A. B. subsequently desired that his name might be struck out of the committee, and it was struck out accordingly. *Held*, under these circumstances, that the principle of the decision in the last case (*Ex parte Cottle*) applied, and that, independently of the stipulation contained in his letter, A. B. having neither expressly nor impliedly assented to any act affecting him with liability, the name of A. B. ought not to be inserted in the list of contributories of the company.¹

THIS case, involving a similar question to the preceding, came before the Lords Commissioners by way of appeal from the decision of the Vice-Chancellor KNIGHT BRUCE, the Master having placed the name of Edward Hunt Roberts on the list of contributories, and his Honor having ordered it to be struck out.

The facts of the case sufficiently appear in the judgment of the Court.

Mr. J. Russell, and *Mr. Roxburgh*, for the official manager, relied on *Ex parte Besley*, (a) followed by the Vice-Chancellor KNIGHT BRUCE, in the cases of *Ex parte Hole* and *Ex parte Justice*. (b) They referred also to *Barker v. Whitworth*. (c)

* *Mr. T. H. Terrell*, for E. H. Roberts, distinguished the * 193 circumstances of the present case from those in *Ex parte Besley*, (a) and suggested a doubt of the accuracy of the decision in that case. He referred also to *Reynell v. Lewis* and *Wylde v. Hopkins*. (d)

Mr. Roxburgh, in reply, referred to *Woolmer v. Toby*. (e)

July 15.

THE LORD COMMISSIONER MR. BARON ROLFE now delivered the judgment of the Court as follows: In this case, to which the

(a) Since reported, *ante*, p. 176. (b) June 7, 1850, not reported.

(c) In the Queen's Bench, before ERLE J. Sittings after Michaelmas term, 1849.

(d) 15 M. & W. 517.

(e) 4 Railway Cases, 713.

¹ See 2 Lindley Partn. (Eng. ed. 1860), 1116 *et seq.*; *Re Birkbeck Life Assurance Company*, 13 W. R. 380.

same principles apply as to that just decided, (a) application was made to Mr. Roberts by a circular from Thomas Floud, a solicitor at Exeter, pointing out the advantages of the proposed line of railway. To this letter Mr. Roberts replied by a letter on the 22d of September, 1845, in which he says, "Being the owner of a set of mills and land in the parish of Bridford, near which, I presume, the proposed railway is intended to come, I beg to inform you, in reply to your note, that you may confidently reckon on my support. In proof of which you may, should you think proper, place my name on the Provisional Committee. Yours, E. H. Roberts. This must be taken subject to my approval of the plans and course of the line when definitively fixed upon, and so that I shall be held free from all liabilities."

No answer was sent to this letter; but the name of Mr. Roberts was put on the list of the Provisional Committee. On the * 194 4th October a meeting of the * Provisional Committee was held, at which twenty-one members were present, including Roberts: and it was then resolved that another meeting should be held on the 7th for appointing a Managing Committee. That meeting was accordingly held, thirty members being present, including Roberts. He took no part in the proceedings at the meeting, and left it before any resolution was formally passed or recorded. The only resolution was that certain gentlemen who were named should be the committee of management. On the 20th October, Mr. Roberts desired that his name might be struck out of the Provisional Committee, and this was accordingly done.

Under these circumstances the Master placed the name of Mr. Roberts on the list of contributories; but on application to Vice-Chancellor KNIGHT BRUCE, his Honor ordered it to be struck out. The official manager moved to discharge this order of his Honor, and to have the name of Mr. Roberts restored to the list; but we think there is no ground whatever for the application to us.

The only circumstance found in this case, and not existing in that which we have just decided (*Ex parte Cottle*), is that Mr. Roberts attended two meetings of the Provisional Committee; but this makes no difference whatever in principle. The question in every case is, not what meetings has a committee-man attended, but what acts has he authorized to be done. Attendance at a

(a) *Ex parte Cottle*, *ante*, p. 185.

meeting proves in general that the party so attending is a member of the body assembled, but it proves no more. If, indeed, any act is done by the meeting, the circumstances may be such as to warrant the presumption that what was done was the act of every person present. Such may be the fair inference under some * circumstances; it may be a very unreasonable inference * 195 in others; and no one present at such a meeting is bound by any resolution to which he does not expressly or impliedly assent. Now here it appears that before any resolution was finally come to, Mr. Roberts had left the meeting, and so the resolutions passed certainly were not his acts. Indeed, if he had concurred, all that he would have concurred in would have been in appointing the persons named in that behalf to be the committee of management; and, as was pointed out in the judgment in the Exchequer, (a) to which we have referred in the preceding case, it by no means necessarily follows from thence that the parties appointing the committee of management gave them authority to make contracts. It is not, however, necessary to discuss this, for it is certain on the evidence before us, that Roberts did not concur in the resolution by which the committee of management was appointed.

We should for these reasons have been of opinion that Mr. Roberts was not a contributory, even independently of the fact that in joining the committee he expressly stipulated that he was to incur no liability. It was urged that this stipulation was not known to the other members; and if without such a stipulation he would by merely joining the committee have become liable to the expenses incurred, the argument arising from the non-communication of that fact to the other members, might be entitled to weight; but it is certain that Mr. Roberts when he joined the committee supposed he had guarded himself against all risks, and this tends strongly to show the propriety of the view taken by the courts of law of the legal position of committee-men. To hold that the mere fact of being a committee-man makes a man * re- * 196 sponsible for others, would in effect be to say that a qualified consent to an application necessarily amounts to, or at all events subjects the party to, the consequences of an absolute one. It is hardly necessary to say that in this case the payment of 65*l.* paid

(a) *Reynell v. Lewis and Wyld v. Hopkins*, 15 M. & W. 517.

by Mr. Roberts does not vary the case: that payment was evidently made merely *causa pacis*, and under protest. (a)

It was pressed upon us that the judgment of his Honor in this case was opposed to that of Lord COTTENHAM in *Besley's Case*; (b) but on referring to the note of the judgment there, we find that Lord COTTENHAM expressly and studiously founds his opinion on the specialties of the case, and so cannot be taken to have decided the general question.

We are of opinion, on the grounds we have already stated, that the motion in this case must be dismissed with costs.

-
- * 197 * In the Matter of KOLLMANN'S RAILWAY LOCOMOTIVE and CARRIAGE IMPROVEMENT Company, and of The JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 and 1849.

Ex parte BERESFORD.

1850. June 26. July 4, 15. Before The Lords Commissioners Lord LANGDALE and Mr. Baron ROLFE.

By the deed of settlement of a company, made between the persons referred to as named in a schedule stated to be annexed to the deed of the first part, and certain parties named and described of the second and third parts, it was provided, that the directors might declare forfeited the shares of any party to the deed who did not execute it before a certain time specified, and also, that on any transfer of shares being made, the transferee should take upon himself all the antecedent liabilities of the transferor. There was no schedule to this deed, but it was executed by several other parties besides those of the second and third parts. A. B., an allottee of shares, paid his deposit and some calls, but did not execute the deed within the time limited, and the directors in consequence declared his shares forfeited and carried them over to the share account of the company. A. B. submitted to this forfeiture, and never made any claim on the company. *Held*, that the name of A. B. was rightly excluded from the list of contributories of the company.¹

(a) It appeared in evidence before the Master that Mr. Roberts, being threatened with an action by a creditor of the company, and in order to avoid legal proceedings, contributed a sum of 65*l.* towards the discharge of the debt.

(b) Since reported, *ante*, p. 176.

¹ See 1 Lindley Partn. (Eng. ed. 1860), 618 *et seq.*; Baily's Case, 15 Jur. 29; *Stewart v. Anglo-Californian Co.*, 18 Q. B. 786; Lord Belhaven's Case, 3 De G., J. & S. 41.

THE Vice-Chancellor KNIGHT BRUCE having held (affirming a previous decision of the Master) that the name of F. M. Beresford was not to be included in the list of contributories of the above company, the official manager now appealed to the Lords Commissioners of the Great Seal.

The facts of the case, together with the arguments of counsel and the judgment of the Vice-Chancellor, are fully reported in the 3d volume of Messrs. De Gex and Smale's Reports, page 175. The point for decision may, however, be shortly stated as follows.

By the company's deed of settlement, which was made between the persons referred to as named in a schedule stated to be annexed to the deed of the first part, and certain parties named and described of the second and third parts, it was provided (article 105) * that the directors might declare forfeited the * 198 shares of any party to the deed who did not execute it before a certain time specified, and also (article 98) that on any transfer of shares being made the transferee should take upon himself all the antecedent liabilities of the transferor. There was no schedule to this deed; but it was executed by several other parties besides those of the second and third parts.

F. M. Beresford was an allottee of five shares in the company, and paid his deposit, and certain calls in respect of them. He did not however execute the deed within the time limited, and the directors in consequence declared his shares forfeited, and carried them over to the share account of the company. To this forfeiture F. M. Beresford submitted, and never made any claim on the company. Under these circumstances, the Master, and subsequently the Vice-Chancellor as above stated, held that the name of F. M. Beresford ought not to be included in the list of contributories.

Mr. Bacon and *Mr. Glasse*, for the official manager, repeated in substance the argument addressed by them to the Vice-Chancellor, and referred to *Ex parte Morgan*. (a)

Mr. W. T. S. Daniel, contra. — The case of *Ex parte Morgan* (a) does not apply to the present. Mr. Morgan was an acknowledged shareholder of the company; but Mr. Beresford never was so. Mr. Beresford's position was that of a party professing an inten-

(a) *Ante*, Vol. I. p. 225.

tion to take shares, but not carrying that intention into effect. He never became a partner in the concern; and the mere allotment of shares did not of itself affect him * with liability to creditors. The directors themselves recognized that his position was such as now described, for they gave him notice to become a complete shareholder by executing the deed, and on his not doing so, they at once declared his shares to be forfeited. Under these circumstances, it is impossible to say that Mr. Beresford is a contributory within the meaning of the Winding-up Act. [He referred to *Fox v. Clifton*; (a) *Pitchford v. Davis*; (b) *Bell v. Lord Mexborough*; (c) *Geddes v. Wallace*; (d) *Walford v. Adie*. (e)]

Mr. Bacon, in reply. — The cases relied upon on the other side are distinguishable from the present. They proceed on the ground of some concealment or misrepresentation; but nothing of that kind exists here. [He referred to *Parbury's Case*; (g) *Sharpus's Case*. (h)]

July 15.

THE LORD COMMISSIONER MR. BARON ROLFE now delivered the judgment of the Court as follows. — In this case Mr. Beresford agreed to take five shares of 20*l.* each in this company, which was established by a deed of the 18th of March, 1845. He paid various instalments on his shares, amounting in all to 40*l.*, part before and part after the date of the deed. He never executed the deed, though often called on so to do. Till he had executed the deed he certainly was not a member of the company, though by his contract he might have made himself subject to all, or some * 200 of its liabilities. There was a clause in the deed * authorizing the directors (*inter alia*) to declare forfeited the shares of any of the parties named in the schedule who should not execute the deed before the 18th of April, 1845. In fact there was no schedule to the deed; but on the 19th of August, 1845, the directors resolved, that if Mr. Beresford did not execute the deed on or before the 25th, his shares should be forfeited. This resolution was communicated to Mr. Beresford, and he having made

(a) 6 Bing. 776.

(b) 5 M. & W. 2.

(c) 5 Railway Cases, 149.

(d) 2 Bli. 270.

(e) 5 Hare, 112.

(g) 3 De G. & S. 43.

(h) *Ib.* 49.

default, the directors on the 26th August declared his shares forfeited, and they were carried to the credit of the company. In this arrangement Mr. Beresford and the company acquiesced, and under these circumstances, the Master held that he was not a contributory, and Vice-Chancellor KNIGHT BRUCE held the same, and we think rightly.

The argument before us in support of the motion to discharge the order of the Vice-Chancellor, and to put Mr. Beresford's name on the list, turned mainly on this, that he had once been a holder of shares, and had never gotten rid of the liabilities arising therefrom; and we were pressed with the well-established doctrine, that where a joint-stock company is trading under a deed, there, shares can only be forfeited or transferred in the mode pointed out by the deed. But that doctrine is not applicable in a case like this, where the party holding what are inaccurately called shares, has never executed the deed, so as to be strictly a shareholder. Mr. Beresford had a right to become, and perhaps might have been compelled to become, strictly a shareholder. Until, however, he had clothed himself with that character, he was merely connected with the company by contract: and when he on the one hand, and the directors on the other, agreed to put an end to that contract and the relations arising out of it on certain terms, it was competent to them so to do, and all further connection between * them ceased. According to the terms of the arrangement, * 201 not perhaps strictly a forfeiture though so designated by the parties, Mr. Beresford, on the 26th of August, 1845, ceased to have any claim upon or liability to the company. This was the view of the case taken by the Master, and by his Honor; and this motion must therefore be refused with costs.

In the Matter of The ST. GEORGE STEAM PACKET Company,
and of The JOINT-STOCK COMPANIES WINDING-UP
ACTS, 1848 and 1849.

Ex parte HENNESSY.

1850. July 4, 10, 11, 15. Before The Lords Commissioners Lord LANGDALE
and Mr. Baron ROLFE.

A shareholder in a joint-stock company, the provisions of whose deed required that every transfer should be executed both by the transferor and transferee, sold his shares, the purchaser buying them on behalf of his son, and procuring the name of his son to be inserted in the list of shareholders of the company. The transfer was executed by the vendor, but not by either the purchaser or his son. It appearing that the son, from the first, repudiated the shares, and that the purchaser never intended to accept them on his own account: *Held* (without deciding any question of liability as between the vendor and the purchaser), that the vendor had not made a valid transfer of his shares, and was rightly placed on the list of contributories of the company.¹

THIS was an appeal by J. C. Hennessy, the executor of M. Hennessy, against an order of the Vice-Chancellor KNIGHT BRUCE, dated the 15th April, 1850, by which his Honor, reversing the decision of the Master who had excluded the name of J. C. Hennessy from the list of contributories of the company, referred it back to the Master to review his report. The following are the facts of the case:—

In 1841, M. Hennessy was the owner of certain shares in the St. George Steam Packet Company. On the 22d October, 1841, he sold sixteen shares of 25*l.* each to Thomas Richard * 202 Needham for 190*l.*, that sum being provided * and paid by T. R. Needham. It appeared that, in consequence of directions given by T. R. Needham, the shares sold were transferred into the name of R. Needham, the son of T. R. Needham; that this transfer was executed by M. Hennessy, but was not executed by R. Needham; that the name of R. Needham was, however, duly enrolled in the books of the company, and registered as one of the shareholders of the company. It also appeared that R. Needham gave no authority to his father for the transfer, but in fact, from

¹ See 2 Lindley Partn. (Eng. ed. 1860), 1128, 1129; Pim's Case, 3 De G. & S. 11.

the first, repudiated the gift ; that he never received any dividend on the shares, or attended any meeting of the company ; that the repudiation of the transfer, though known to T. R. Needham, was never communicated to M. Hennessy or the company ; that both M. Hennessy during his life and J. C. Hennessy, as his executor after his death, which took place in May, 1846, paid calls on shares which M. Hennessy continued to hold in the company, but no calls on the sixteen shares transferred ; that neither M. Hennessy nor his executor heard any thing in reference to these shares until October, 1849, when the latter received notice that his name was put on the list of contributories of the company by the official manager.

T. R. Needham made an affidavit, stating that, in consequence of his son repudiating the gift of the shares, and the transfer not having been executed, he treated the transaction as at an end, and that, though he received circulars and notices addressed to his son, he destroyed them without making any communication to his son. The following are the principal clauses of the deed of settlement of the company which were referred to in the course of the argument.

Clause 17. "That it shall be lawful for the proprietors in the said company, or their legal representatives,* whether * 208 by marriage, or as executors, or administrators, or legatees, to sell and transfer to any person or persons whomsoever, all or any of the shares of such proprietor in the property and funds of the company, and whenever any such sale and transfer shall be made, a return or account thereof shall be made to the clerk or the agent for the time being of the said company, and shall from time to time be entered and registered in the books of the said company, on payment of the fee of 2s. 6d. on each share so transferred, and the person or persons to whom such transfer shall be made shall be and stand in all respects, and to all intents and purposes, in the place and stead of the person or persons making such transfer, and shall be liable to be sued in an action of covenant or otherwise for any breach of the rules and regulations of the said company, as fully and effectually to all intents and purposes as if such person or persons to whom such transfer or transfers shall have been made had been a proprietor or proprietors at the date of these presents, and the form of transfer of such share or shares may be in the following words or to the like effect, vary-

ing the names and descriptions of the contracting parties as the case may require : —

— to — } I of in consideration of
 both inclusive. } paid to me by of in the county of
 do hereby bargain, sell, assign, and transfer, to
 the said shares of l. each numbered as per margin of
 and in the capital stock of the company called the St. George
 Steam Packet Company, To hold unto the said , his
 heirs, executors, administrators, and assigns, subject to the same
 conditions as I held the same immediately before the execution
 hereof. And I, the said do hereby agree to accept and
 take the said shares, subject to the same conditions. As witness
 our hands, this day of 18 .
 Witness (Signed)

* 204 * Clause 18. “ And every deed or transfer, being executed by the seller or sellers and the purchaser or purchasers of such share or shares, shall be delivered to and kept by the clerk of the said company, who shall enter in a proper book or books to be kept for that purpose a memorial of such transfer and sale, and indorse the entry of such memorial on the said deed of sale or transfer, for which no more than 1s. is to be paid, and on request a certificate of each share shall be delivered by him to the purchaser or purchasers for his, her, or their security, and for which certificate no more than 1s. 6d. shall be paid ; and until such memorial shall have been made and entered as above directed, such purchaser or purchasers shall have no part or share in the profits of the said company, nor any interest for such share or shares paid to him, her, or them, nor any vote or votes in respect thereof as a proprietor or proprietors of the company.”

Clause 21. “ That every person who being a purchaser of any shares in the capital of the company shall take a transfer or assignment of such shares, and shall not previously to such purchase have executed or otherwise acceded to these presents, and shall not at the time of the said shares vesting in him in such capacity by the means aforesaid be a recognized proprietor in the company in respect of any other shares in the capital, shall as to all duties, obligations, claims, and demands upon or against him, in respect of such shares be considered as a proprietor in the company from the time of the shares being so purchased by or becoming so

vested in him as aforesaid, but as to all profits, rights, privileges, benefits, and advantages to arise from the said shares, no such person shall be considered a proprietor in respect of the same until he shall have executed or otherwise acceded to these presents."

* Clause 51. "That the person by whom or in whose * 205 name the shares shall be held or stand shall to all intents and purposes whatsoever be deemed at law and in equity the absolute, sole, and beneficial owner and holder of such shares, and shall as such be the only person known to or recognized by the said company in all votes, transfers, notices, payments, receipts, and other matters relative to the same shares, and the company shall in no case be bound to notice or be affected with express notice of any trust."

Mr. Malins and *Mr. Surrage*, for J. C. Hennessy, submitted generally that the transfer was valid, and that at the time of the passing of the Winding-up Act, M. Hennessy had ceased to be liable as a shareholder in the company; that the Winding-up Act created no new liability, and, therefore, that the Master had rightly excluded the name of J. C. Hennessy from the list of contributors. They contended that the provisions contained in the deed of settlement relative to the form in which transfers were to be made were only for the protection of the company, and did not affect the validity of an Act, which, as in this case, the company had themselves recognized. *Taylor v. Hughes*. (a) They referred to *Burnes v. Pennell*, (b) as showing that M. Hennessy could not have shared in the profits of the company, and could not therefore be held liable for losses. They mentioned also the case of *Foster v. The Governor and Company of the Bank of England*. (c)

Mr. Bacon and *Mr. J. V. Prior*, contra, referred to the clauses of the deed of settlement above set out, and * con- * 206 tended that under these it was clear that the estate of M. Hennessy must still be held liable, there having been neither in the original form of the transaction, nor by any subsequent acts on the part of the alleged transferee, a recognition of any transfer of the liability of the original shareholder.

Mr. Malins, in reply.

(a) 2 Jones & Lat. 24.

(c) 15 Law J. Q. B. 212.

(b) 2 H. L. 497.

July 15.

THE LORD COMMISSIONER MR. BARON ROLFE now delivered the judgment of the Court as follows: In this case the company had been duly constituted by deed, and it was in full operation. Michael Hennessy was in and prior to the year 1841 a shareholder, holding several shares, that is, one of 100*l.*, and several of 25*l.*; and the only question is, whether, on the 22d October, 1841, he so sold and transferred sixteen 25*l.* shares as to have gotten rid of all liability to the company in respect of them. Michael Hennessy died in 1846, and J. C. Hennessy is his personal representative. The Master considered that Michael Hennessy had, in 1841, divested himself of all interest in these sixteen shares, and refused to place his executor on the list of contributories; but, on the application of the official manager, Vice-Chancellor KNIGHT BRUCE came to a different conclusion, and referred it back to the Master to review his report, in order that he might place on the list the name of J. C. Hennessy as executor of Michael. Mr. Hennessy moved, by way of appeal, to discharge this order on the ground above stated; namely, that Michael Hennessy had ceased to be the holder of these shares in October, 1841.

* 207 * A great deal of evidence was taken before the Master; but there appears, in the result, to be no doubt about the facts, and the only question is, as to the legal consequence of those facts when considered with reference to the clause in the company's deed relative to transfers. The clause directing the mode of transfer is clause 17, and is as follows;— (His Lordship here read the clause as above set out.)

The facts are these: in October, 1841, Thomas Richard Needham, wishing to benefit his son Richard Needham, who was an engineer and whose business made it necessary for him often to cross to and from England and Ireland, purchased for his son through a broker at Cork, the sixteen shares in question from Michael Hennessy (the holder of shares to a certain amount having the privilege of passing to and fro in the company's vessels without charge). The purchase-money, 190*l.*, was then paid to Michael Hennessy by the agent of Thomas Richard Needham, but the purchase was made in the name of the son. Michael Hennessy thereupon executed, at the office of the company at Cork, a transfer to the son, that is, Richard Needham, of the sixteen shares; but this transfer was never executed or acceded to

by Richard Needham. On the contrary when he was soon afterwards informed, by Thomas Richard Needham his father, of what had been done, he wholly declined to have any thing to do with the shares, believing, as he says, that the company was insolvent.

Under these circumstances, it is plain that nothing had been done by Richard Needham which could make him liable as a contributory. It was however argued that, though Richard Needham the proposed transferee might not be liable, still the company had precluded *itself from treating Michael Hennessy * 208 as still being one of its members; but this is not so.

Michael Hennessy, in order to relieve himself from liability, was bound to procure a transferee who should put himself in his place. The only transfer ever attempted to be made was to Richard Needham the son, who it is admitted never in any manner accepted it. The mode of transfer required by the deed of settlement is, as we have already seen, a transfer to be executed by the transferee, in order to signify his consent and so to make himself liable as a purchaser. Till that had been done, the seller continues liable to the company as one of its members. It was said that there were laches in the company in not getting the transferee to signify his acceptance or rejection; but this is not so. What could the company do more than they did? There was the transfer executed by the seller waiting to be executed by the purchaser, if he had chosen to present himself, but he never did so.

It was argued that this was really a purchase by the father, and some facts were relied on in the evidence tending to show that the company considered and treated the father as the purchaser. This we think is not at all made out; but even if it were, it would not vary the case; for it is abundantly clear that the transfer in the books was to the son, and not to the father; and the evidence clearly shows that the father never accepted, or intended to accept, any of the shares in question. Whether, as between Hennessy and the father, the father might be compelled to accept the shares, is a question not now before us.

Vice-Chancellor KNIGHT BRUCE was of opinion that Michael Hennessy, as a shareholder, was liable up to the * 21st * 209 October, 1841; that never having made a valid transfer, he continued liable after that date and up to his death; and so that the name of J. C. Hennessy, his executor, was properly placed on the list of contributories. In that opinion we entirely concur, and this motion must, therefore, be refused with costs.

FORSYTH v. ELLICE.

1850. July 11, 15. Before The Lords Commissioners Lord LANGDALE and Mr. Baron ROLFE.

The general rule is, that depositions taken *de bene esse* are not to be published in cases where the witness might have been and was not examined in the regular way, the proper period for such examination being between the time when the cause is at issue and when publication passes.

This general rule is, however, liable to exception in a special case.

Where the right or liability to account is in question in a cause and not particular items of account, it would be improper for the purpose of the hearing to examine witnesses upon particular items not specially charged in the pleadings to be erroneous; and therefore in such a case, and as an exception to the general rule, the depositions of a witness examined *de bene esse* as to particular items might be published after the hearing of the cause, although such witness might have been and had not been examined in the regular way before publication passed. *Semble*.

The case of a witness examined *de bene esse* as to the general correctness of accounts, and not examined subsequently as he might have been in the regular way, held not to constitute an exception to the general rule; and a motion after the hearing to publish his evidence for the purpose of using it in the Master's office refused.¹

In this case a motion had been made by the plaintiffs before the Vice-Chancellor WIGRAM, after the hearing of the cause, that the evidence of a witness taken *de bene esse* in Canada might be published and read before the Master to whom the cause had been referred. It did not appear that there was any thing to have prevented the examination of the witness in the ordinary way before publication passed in the cause. The defendant opposed the motion before the Vice-Chancellor as being totally irregular, and also on the ground that there was no proof that the witness

* 210 * was not then in a condition to be personally examined.

The Vice-Chancellor having overruled the first ground of objection, and having made an order referring it to the Master to make inquiries on the other point, the defendant now appealed to the Lords Commissioners of the Great Seal.

The facts of the case are fully stated in the judgment of the Court, and will also be found in the 7th volume of Mr. Hare's Reports, page 290.

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 938, 939.

The Solicitor-General, and *Mr. Brett*, for the defendant, insisted that the order of the Vice-Chancellor was wrong, and that, according to the settled practice of the Court, the evidence in question could not now be used. *Fitzpatrick v. Webb. (a)*

Mr. R. Palmer and *Mr. Dickenson*, contra. — The general rule of practice relied upon on the other side does not apply, for the plaintiffs in this case could not properly have examined the witness for the purpose of the hearing, and were not therefore bound to publish his evidence. His evidence relates solely to the accounts, and could only be used in the Master's office; and it is a rule of this Court that a plaintiff is not for the purpose of the hearing to enter into evidence on the subject of accounts. *Law v. Hunter, (b)* *Walker v. Woodward, (c)* *Tomlin v. Tomlin, (d)* *Duke Hamilton v. Meynal. (e)* The circumstances of the case of *Fitzpatrick v. Webb (a)* were entirely different from those of the present, and the decision therefore does not apply. [They also referred to *Smith v. Althus. (g)*]

* *The Solicitor-General*, in reply.

* 211

July 15.

THE LORD COMMISSIONER LORD LANGDALE now delivered the judgment of the Court as follows: In this case a motion was made before Vice-Chancellor WIGRAM that the depositions of a witness taken *de bene esse* might be published, and it was ordered that the motion should stand for further evidence as to the state of the witness's mind, with a view to ascertain whether he was then capable of being examined. The defendant Ellice now moves to discharge the order, and that the motion for the publication of the depositions may be refused.

The original bill was filed in June, 1837, and answered on the 20th August, 1838, and being amended in February, 1839, another answer was put in on the 20th May, 1842. The bill was further amended, and another answer put in in 1843, and replication in the causes was filed on the 16th April, 1844. In the mean

(a) 2 Moll. 313.

(c) *Ib.* 107.

(b) 1 Russ. 100.

(d) 1 Hare, 241 n.

(e) 2 Dick. 788; S. C., as Anonymous, 2 Ves. 497.

(g) 11 Ves. 564.

time the plaintiffs moved that Charles Tait should be examined as a witness *de bene esse*. The application was supported by two affidavits, one of William Forsyth and John Blackwood Forsyth, who stated that they were informed and believed that Charles Tait was a very material witness on their behalf in the causes, and that without his evidence they could not safely proceed to a hearing therein; that he was the only witness to some of the facts and circumstances connected with the matters in question in the cause, and which they were advised were material and necessary to be proved therein. The other affidavit was that of John Rance Heawood,

* 212 who stated that the entries in * the books of Sir Alexander Mackenzie & Co., touching the transactions mentioned or referred to in the pleadings or many of them, were made by Charles Tait, and that various accounts touching such transactions were made out by the said Charles Tait, who was the only witness who could prove the correctness of the entries in the books and the accounts so made out by him. Upon these affidavits, an order was made for the examination of the witness *de bene esse*, and he was examined accordingly.¹ The causes being at issue, witnesses were examined on both sides in the usual course. The plaintiffs did not (as for any thing which appears to the contrary they might have done) examine Charles Tait regularly as a witness in the cause. If he had died or become incapable before publication or before the examination of witnesses had been completed, his depositions taken *de bene esse* might have been published; but it does not appear that the occasion arose for asking for an order for that purpose, and in July, 1844, publication passed in the regular way.

A decree was made on the 11th July, 1845. Charles Tait is said to have become insane in 1846; and on the 14th January, 1850, the motion was made to publish his depositions, and that the same might be read before the Master to whom these causes were referred. This motion was supported by the affidavit of Robert Cowie, who stated that Thomas Thain left Canada in 1826, and that after his departure the books of account referred to were kept or made up by Charles Tait, who was the only person who (but for the unsoundness of his mind) could give evidence of the accounts and of the errors and corrections existing in such accounts; and by the affidavit of Francis Ommaney, who states that, in proceeding to take the

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 933 *et seq.* and notes.

accounts the Master has called on the plaintiffs to produce evidence relating to * or explanatory of contested items of * 213 account between the plaintiffs, and defendants, and that Charles Tait is the only person who (but for his insanity) would be able to give such evidence.

The question is, whether, under the circumstances here stated, the motion ought not to have been refused. The Vice-Chancellor considered that, if it had been proved that the witness was insane at the time when the motion was made, the depositions ought to have been published.

There can be no doubt that, according to the general rule, depositions taken *de bene esse* in a cause are not to be published in cases where the witness might have been and was not examined. Not, however, construing the words "might have been" so strictly as to make it absolutely necessary that an examination or an endeavour to examine the witness should be made at the earliest possible moment of the period during which the examination might or ought to have been made; but the proper period for examination is between the time when the cause is at issue and the time when publication passes; and if during this period the witness, whose depositions *de bene esse* it is desired to publish, might have been and was not examined, publication of depositions taken *de bene esse* has not in any case been allowed. All general rules may, however, be liable to some exception in a special case.

A special reason for not examining the witness in this case is stated to be that, according to two cases before Lord GIFFORD, (a) witnesses ought not to be examined before the hearing as to disputed items of * account.¹ Without repeating observa- * 214 tions which have often been made on those cases, there is no doubt that in a case where the right or liability to account and the general authenticity of books and accounts, and not particular items, were alone in question, it would be improper to examine witnesses upon particular items of account not specially charged to be erroneous in the pleadings. In this case it is not stated that in the pleadings, and in the affidavits it does not appear that, particular items were charged to be erroneous, or that the intention was to examine the witness concerning particular items of ac-

(a) *Law v. Hunter*, 1 Russ. 100; and *Walker v. Woodward*, *ib.* 107.

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 856, 857, and note (1).

count. The witness, as appears by the affidavits, was intended to prove the correctness of the entries made by him in the books and in the accounts made out by him ; he might, therefore, under the order have been properly examined as to the fact whether the entries which he had made in the books and accounts were correct ; but he could not have been properly examined for the purpose of proving errors or special facts not charged in relation to particular items of the account ; and depositions taken upon particular items of account, of the impeachment of which the other parties had no notice, could not, as it seems to us, be read against them.

The opposition to the motion to discharge the order of the Vice-Chancellor was also supported by reference to the case of *Smith v. Althus*, (a) in which it was correctly stated by Lord ELDON, that when the Court directs an inquiry into a fact, it is in the nature of a new issue joined. But that issue arises out of the facts charged or alleged in the cause ; and the trial of it proceeds in a regular manner, the examination of witnesses in the Master's office

* 215 being founded on facts specifically * charged.¹ If in this case it were held that upon the accounts to be taken in the Master's office the issues were new, as is assumed in the argument, and that the witness examined *de bene esse* was not examined on facts in any way appearing to be put in issue at the time when he was examined, the other parties who could not be aware of the subject of the examination might be exposed to the greatest injustice.

We cannot think that this is merely a question of strict practice. Various occasions occur in which the examination of witnesses *de bene esse* is absolutely necessary for the due administration of justice ; and if the examination be properly conducted, the depositions, though not taken under all the sanctions which are desirable, must, under proper circumstances, be read and used ; but the rule that the party obtaining such depositions must, if he have the opportunity, examine the witness in a regular manner and with all the sanctions thought necessary in other cases, is also of great importance ; and in this case we do not think that the special circumstances warrant any departure from the general rule. It therefore appears to us that the order complained of must be discharged.

(a) 11 Ves. 564.

¹ See *Gordon v. Hobart*, 2 Story, 243, 260, 261 ; *Consequa v. Fanning*, 3 John. Ch. 587, 595.

* BETWEEN

* 216

ANDREW INDERWICK and ALFRED COWAN, on behalf of themselves and all other the Proprietors or holders of Shares in THE LONDON CONVEYANCE COMPANY (except the Defendants to the Bill) Plaintiffs.

AND

HENRY SNELL, ALEXANDER HAMILTON, FREDERICK WINDLE WHEATLEY, HENRY HARMS, ROBERT TANNER, EDWARD DONNE, THOMAS SEABORNE, and THOMAS HEMMING JOHNSON Defendants.

1850. July 5, 9, 10, 15. Before the Lords Commissioners Lord LANGDALE and Mr. Baron ROLFE.

At a meeting of a company regularly convened, resolutions were passed removing certain directors for misconduct, the deed of settlement of the company providing that such a meeting might remove any director "for negligence, misconduct in office, or any other reasonable cause." Other directors were subsequently elected in their place. A bill was then filed by the removed directors to set aside the proceedings of the meeting and the election of the new directors. *Held*, on a motion for an injunction to restrain the new directors from acting, that the expression "reasonable cause" in the company's deed did not refer to such a cause as in a court of justice would be held reasonable, but only to such a cause as should be deemed reasonable by the shareholders assembled at a meeting duly convened, and therefore that the Court had no jurisdiction to interfere¹ nor, where no case of direct fraud was proved, to determine whether the decision of the meeting had or had not been unduly influenced by unfounded statements made by persons taking an active part in the proceedings.²

THIS was a motion by the defendants H. Snell, A. Hamilton, F. W. Wheatley, E. Donne, and T. Seaborne, to discharge an order made by the Vice-Chancellor WIGRAM on the 15th June, 1850, the

¹ See *Hopkinson v. Marquis of Exeter*, L. R. 5 Eq. 63; *Manby v. Gresham Life Assurance Soc.*, 29 Beav. 439; *Angell and Ames Corp.* § 713.

² A Court of Equity will not interfere between members of companies for the purpose of enforcing duties arising out of matters which are properly the subjects of internal regulation; the Court will not interfere, if the relief sought is in respect of acts the legality or illegality of which depends on the voice of a majority of the stockholders. *Bailey v. The Birkenhead, Lancaster, and Cheshire Junction Railway Co.*, 12 Beav. 433; *Browne v. The Monmouthshire Railway and Canal Co.*, 13 Beav. 32; *Kent v. Jackson*, 14 Beav. 367; 2 De G., M. & G.

effect of which order was to restrain the defendants H. Snell, A. Hamilton, and F. W. Wheatley from acting as directors of the London Conveyance Company, except in concurrence with the plaintiffs and the defendant T. H. Johnson.

* 217 * From the manner in which the case was dealt with by the Court, a very few words only are necessary by way of introduction to the judgment of the Lords Commissioners.

The affairs of the London Conveyance Company previously to the 20th December, 1849, were managed by six directors; viz., the plaintiffs, and the defendants H. Snell, A. Hamilton, F. W. Wheatley, and T. H. Johnson. At an extraordinary general meeting of the company held on the 20th December, 1849, the plaintiffs A. Inderwick and A. Cowan, together with the defendant T. H. Johnson, were removed from being directors on the ground of alleged misconduct. The defendants H. Harms, R. Tanner, and E. Donne were subsequently chosen in the place of the removed directors; and the defendant T. Seaborne was chosen an additional director, the deed of settlement of the company authorizing the appointment of seven directors. It appeared that the plaintiffs protested against the meeting of the 20th December, 1849, and refused to be present at it.

On the 4th March, 1850, the plaintiffs A. Inderwick and A. Cowan filed their bill, the object of which was to have the meeting of the 20th December, 1849, declared illegal, and the proceedings thereof and the subsequent election of the new directors set aside. The bill prayed an injunction to restrain the defendants T. Snell, A. Hamilton, and F. W. Wheatley from acting as directors, except in concurrence with the plaintiffs and T. H. Johnson, and to restrain the defendants E. Donne and T. Seaborne from acting at all as directors of the company. The grounds relied on by the plaintiffs will be found fully stated in the judgment of the Lords Commissioners.

* 218 * The plaintiffs moved before the Vice-Chancellor WIGRAM for an injunction in the terms prayed by the bill; and on this application his Honor made the order now sought to be discharged.

49; *Edwards v. The Shrewsbury and Birm. Railway Co.*, 2 De G. & S. 537; *Yetts v. The Norfolk Railway Co.*, 3 De G. & S. 293; *Stevens v. The South Devon Railway Co.*, 9 Hare, 313; 2 Lindley Partn. (Eng. ed. 1860), 754 *et seq.* 779; *Gregory v. Patchett*, 13 W. R. 34.

The Solicitor-General and *Mr. Glasse* for the defendants H. Snell, A. Hamilton, F. W. Wheatley, E. Donne, and T. Seaborne, in support of the appeal motion. (a)

Mr. Bethell, *Mr. W. M. James*, and the *Hon. F. Byron*, for the defendants H. Harms and R. Tanner, who having also appealed by a separate notice of motion against the order of the Vice-Chancellor, supported the present application.

Mr. Toller, for the defendant T. H. Johnson.

Mr. Wood and *Mr. Bird*, for the plaintiffs, supported the order of the Vice-Chancellor.

A large body of evidence was gone into on both sides, but it appears unnecessary to notice it for the purpose of the present report.

The argument turned chiefly on the question whether it was competent for the Court to interfere with the decision of the general meeting of the 20th December, 1849, regard being had to the terms of the deed of settlement of the company, and to the facts of the case in reference to that meeting. It was also contended * that the suit was improperly framed, inasmuch as the * 219 plaintiffs did not represent the absent shareholders. With regard to the meeting of the 20th December, 1849, it was insisted by the defendants, and as will be seen from the judgment held by the Court, that it was convened in conformity with the provisions of the deed, and that no fraud was practised in reference to the proceedings which took place at it.

The following cases were cited and commented on as bearing on the several points raised in the argument. *The Queen v. The Governors of Darlington School*, (b) *In re Fremington School*, *Ex parte Ward*, (c) *Colman v. The Eastern Counties Railway*

(a) The motion was opened on the 22d June, 1850, before the Lords Commissioners Sir LANCELOT SHADWELL and Mr. Baron ROLFE, but in consequence of the illness of the former, was subsequently reopened and argued as stated in the report here given.

(b) 6 Q. B. 716.

(c) Before Vice-Chancellor KNIGHT BRUCE, May and June, 1846, and January and February, 1847.

Company, (a) Bagshaw v. The Eastern Union Railway Company, (b) Foss v. Harbottle, (c) Mozley v. Alston, (d) The Exeter and Crediton Railway Company v. Buller, (e) Lord v. The Governor and Company of Copper Miners, (g) Ridgway v. The Hungerford Market Company, (h) Natusch v. Irving. (i)

July 15.;

[THE LORD COMMISSIONER LORD LANGDALE now delivered the judgment of the Court as follows: This was a motion to discharge an order of Vice-Chancellor WIGRAM, whereby it was ordered that the defendants Snell, Hamilton, and Wheatley should be restrained from doing, authorizing, or permitting any * act as directors of the London Conveyance Company, except as therein mentioned, and also from preventing or interfering with the plaintiffs and the defendant Johnson, in exercise of their powers as directors of the company. There are other directions in the order, which it does not appear necessary to enumerate on this occasion.

There were six directors of the company, Inderwick, Cowan, Johnson, Snell, Hamilton, and Wheatley. In the year 1849 disputes took place; Mr. Snell charged Inderwick, Cowan, and Johnson with misconduct, and, at length, an extraordinary general meeting of the shareholders, one of the objects of which was to remove Inderwick, Cowan, and Johnson from being directors was convened. The meeting was held on the 20th December, and it was then resolved that Inderwick, Cowan, and Johnson should be removed. This removal is the act principally complained of by the bill, and in respect of which relief is sought.

The plaintiffs allege first, that the defendant Snell and others used improper and fraudulent means to procure the resolutions to be passed; secondly, that the meeting was illegally convened; and thirdly, that no legal grounds of removal were substantiated.

On the other hand, the alleged fraud is denied; secondly, the meeting is alleged to have been convened and conducted with regularity; and thirdly, it is contended that it was lawfully in the power of the shareholders assembled at the time to consider and

(a) 10 Beav. 1.

(b) 7 Hare, 114.

(c) 2 Hare, 461.

(d) 1 Phil. 791.

(e) 16 Law J. Ch. 449.

(g) 2 Phil. 740.

(h) 3 A. & E. 171.

(i) Gow on Partnership, App. p. 398.

determine the question whether the grounds of removal then alleged were or were not reasonable; and that the meeting having considered that there were reasonable grounds * of * 221 removal, this Court has no authority to control its decision.

As we do not think that there is any sufficient evidence of the fraud alleged, we have had to consider, first, whether the meeting was regularly convened, and if so, secondly, whether the shareholders thus assembled had sufficient authority to remove the directors in the manner they did.

On reading the clauses of the deed relating to the calling of meetings of the shareholders, we are of opinion that the meeting of the 20th December, 1849, was regularly convened, and that it was lawful for the shareholders there assembled to consider and determine the question whether the directors complained of should be removed. It was no legal objection to the consideration and determination of that question that no notice was given that other questions were to be considered at the same meeting.

Now the 27th clause of the deed provides, "that an extraordinary general meeting specially called for the purpose may remove from his office any director or auditor for negligence, misconduct in office, or any other reasonable cause." The argument for the plaintiffs rested on the allegation that the general cause of removal referred to in the clause being expressed to be reasonable, prevents the power referred to from being a power to remove at pleasure arbitrarily or capriciously, and made it requisite that the proceeding for exercising the power should be in its nature judicial, and that the reasonable cause should be such as a court of justice would consider good and sufficient. If this argument could be sustained, all proceedings at such meetings would be subject to the review of the courts of justice, * which would have to * 222 inquire whether the cause of removal which was charged was in their view reasonable, whether the charges were *bonâ fide* brought forward, whether they were substantiated by such evidence as the nature of the case required, and whether the conclusion was come to upon a due consideration of the charge and evidence. But the deed is silent as to these matters, and the question is whether any such power of control in the courts of justice is to be inferred from the words "reasonable cause" contained in the 27th clause; whether the expression "reasonable cause" contained in such a deed of a trading partnership can be held to be such a

cause, as upon investigation in a court of justice must be held to be *bonâ fide* founded on sufficient evidence and just; or whether it ought not to be held to mean such cause as in the opinion of the shareholders duly assembled shall be deemed reasonable. We think the latter is the true construction and effect of the deed.

In a moral point of view no doubt every charge of a cause of removal ought to be made *bonâ fide*, substantiated by sufficient evidence, and determined on a due consideration of the charge and evidence; and those who act on other principles may be guilty of a moral offence: they may be very unjust, and those who (being present at the meeting) are innocently misled by the statements made to them, have no doubt a just right to complain that they have been led to concur in an unjust act. But the question is, whether by this deed the shareholders duly assembled at a general meeting might not, or had not a right to, remove a director for a cause which they thought reasonable, without its being incumbent upon them to prove to this or any other court of justice that the charge was true and the decision just, or that the case was

* 223 substantiated * after a due consideration of the evidence and charge. We cannot take upon ourselves to say that in the case of a trading partnership like this, this Court has upon such a clause in the deed of partnership jurisdiction or authority to determine whether, by the unfounded speech of any supporter of the charge, the shareholders present may not have been misled or unduly influenced.

All such meetings are liable to be misled by false or erroneous statements, and the amount of error or injustice thereby occasioned can rarely, if ever, be appreciated. This Court might inquire whether the meeting was regularly held, and in cases of fraud clearly proved, might perhaps interfere with the acts done; but supposing the meeting to be regularly convened and held, the shareholders assembled at such meeting may exercise the powers given them by the deed. The effect of speeches and representations cannot be estimated, and for those who think themselves aggrieved by such representations, or think the conclusion unreasonable, it would seem that the only remedy is present defence by stating the truth and demanding time for investigation and proof, or the calling of another meeting, at which the whole matter may be reconsidered. The plaintiffs, objecting to this meeting and considering it illegal, protested against it, but abstained from

attending, and, therefore, made no answer or defence to and required no proof of the charges made against them. The adoption of this course was unfortunate, but does not afford any grounds for the interference of this Court.

We are far from thinking that the charges made by Mr. Snell against the plaintiffs and Mr. Johnson were well founded. He appears to have made a very exaggerated,* and in some * 224 respects an unfounded statement; and in the present state of the evidence, if the question were, whether the charges were well founded, we might think it our duty to say that they were not. But as the real question is, whether the shareholders at the meeting had not a right to remove directors for such causes as to them seemed reasonable; and as we think that, on the true construction of the deed, they had such right, we are of opinion that the order granting an injunction ought to be discharged.

* The ATTORNEY-GENERAL v. ANDREWS. * 225

1850. June 24. Before the Lords Commissioners Lord LANGDALE and Mr. Baron ROLFE.

Commissioners under a local Act of Parliament, the object of which was to supply the town of S. with water, were empowered to raise funds by assessment, to be applied in certain specified ways, having immediate reference to the purposes of the Act, and in otherwise carrying the Act into execution: *Held* that, although the commissioners might have properly applied the funds raised in resisting a proceeding in Parliament prejudicial to the object of the Act; yet they were not justified in applying them to defray the expense of obtaining another Act of Parliament giving more extensive powers for carrying out the object of the existing Act.

THIS was an application on behalf of the defendant to discharge a special injunction granted by the Vice-Chancellor of England on the 24th January, 1850, whereby his Honor restrained the commissioners of the Southampton Waterworks from paying any moneys, being part of, or arising from, the rates levied or to be levied under the provisions of a local Act of Parliament, in or towards the expenses incurred or to be incurred in or about the preparing, promoting, or prosecuting an intended Bill or Act of Parliament.

The information, which was filed at the relation of William

James Le Feuvre, a town councillor and *ex officio* commissioner, against Richard Andrews, one of the commissioners (the Act constituting the commissioners authorized them to sue or be sued in the name of one of their body), stated that, by the following, among other provisions of the Act 6 & 7 Will. 4, c. 96 (local and personal) it was enacted that it should be lawful for the commissioners of the waterworks thereby authorized to continue and maintain the then present conduits, reservoirs, and other waterworks belonging to the town of Southampton, and to improve and extend the same, and particularly to enlarge the then present reservoirs in the common near Southampton, and to build, erect,

* 226 construct, and maintain such other * reservoirs or waterworks on the said common as might be necessary or convenient, and as the commissioners should think proper for furnishing an additional supply of water, and from time to time to alter, repair, or discontinue the same works or any of them, and to substitute others in their stead, and generally to do and execute all other matters and things necessary or convenient for constructing, continuing, maintaining, altering, repairing, or using the works, and also to collect and raise water by boring in and under the said common, or by such other ways and means as they might from time to time think proper, and to take and use any springs or streams of water which might be found in constructing the said works, they, the said commissioners, doing as little damage as might be, and making compensation for any injury that might be sustained by any persons or corporations by the exercise of such powers, and to convey such water through or under the several streets, roads, lanes, and other places within the limits of the Act, or any of the public roads adjoining the said town or the liberties thereof, for the purpose of supplying with water the inhabitants of the said town, &c. And the said commissioners, at any meeting held in pursuance of such Act, were thereby authorized and empowered out of the first moneys arising from such rate or assessment to pay the charges and expenses of procuring and passing the Act, and after payment of such charges and expenses to apply the produce of such rate in the carrying into execution the purposes of the Act, and also to pay and discharge any moneys borrowed, and any debt or debts incurred in the execution of certain Acts therein recited and thereby repealed that might, at the passing of the Act, remain unpaid; and out of the first moneys which should

come to their hands by any means whatsoever, the commissioners were thereby required * in the first place to pay and * 227 discharge the costs, charges, and expenses incurred preparatory to, and in applying for, and passing the Act, together with lawful interest for any money advanced for that purpose from the time or respective times of such advances, and to apply the remainder of such moneys in payment of the interest which should from time to time become due on the moneys borrowed by virtue of the repealed Acts, and to be borrowed under the powers of the Act, and in payment of annuities granted by virtue of the repealed Acts, or to be granted under the provisions of the Act, and in repairing, extending, and enlarging the works, and erecting new works, and in otherwise carrying the Act into execution.

The information then stated that, in pursuance of a resolution come to by the majority of the commissioners on the 7th November, 1849, notices were published that an application was intended to be made to Parliament in the ensuing session for leave to bring in a bill to amend and extend or to repeal and otherwise provide for the powers and provisions of the above Act, and that it was intended to enable the commissioners to take water from certain other places than those from whence it was then derived, with various other powers; that at a subsequent meeting it was resolved by a majority of the commissioners, that a sum of 250*l.* should be advanced to meet the necessary expenses of obtaining the intended Act; and that a cheque for this amount was drawn by the commissioners and cashed by their bankers. The prayer of the information was in the terms of the injunction granted by the Vice-Chancellor as above stated.

Mr. Roll and *Mr. Shebbeare*, for the defendant, submitted that an application by the commissioners to * Parliament * 228 for an extension of their powers was clearly for the advantage of the town, and if not within the express letter of the existing Act, was quite within its scope and intention; that the commissioners might have expended all the rates in boring and other works; that they also would have had a right to apply the rates in opposing an Act of Parliament: *Bright v. North*; (a) and that, therefore, they ought to be invested with similar powers when

originating an application to Parliament with the view of maintaining the interests of which they were the trustees.

Mr. Malins and *Mr. G. M. Giffard*, in support of the injunction, were not called upon by the Court.

THE LORD COMMISSIONER LORD LANGDALE.—The only question here is, whether the commissioners are entitled, under the provisions of this Act of Parliament, to expend money which belongs to them as such commissioners in an application to Parliament for increased powers to be exercised for the benefit of the town of Southampton. The Act of Parliament was passed in the year 1836; its object was to maintain the public conduits and other works belonging to Southampton, and to provide an additional supply of water to the inhabitants of the town and neighbourhood. (His Lordship here referred to the provisions of the Act.)

Now what the commissioners want to do is more than the Act contemplates, or in any way empowers; and they want to do it by means of funds raised by the assessment, which, under this Act, they have power to make. It is said that the obtaining of an Act of Parliament is to be considered as incident to the objects * 229 in * view under the powers given by the Act, but it does not appear to me to be so. The powers given to the commissioners are given to them for certain specific purposes, and they have not the least reference to any application to be made to Parliament. In that respect this case is not at all similar to the one that has been cited, because if the commissioners were making a defence against an aggression of such a nature as could only be resisted by an Act of Parliament, then indeed it might be said that the power of applying for such an Act was incidental to the power they necessarily must have for the defence of the interests intrusted to them. There is nothing, however, of that kind at all to be found in the present case. The only thing here to be determined is, whether the funds raised by the rates assessed for the particular purposes of this Act are to be applied for other purposes of a similar kind, which, in all probability, would be greatly beneficial to the inhabitants of Southampton. Upon, however, looking at and considering this Act, it appears to me that the Vice-Chancellor has come to a perfectly correct conclusion, and that there is no reason to disturb it.

THE LORD COMMISSIONER MR. BARON ROLFE, in expressing his concurrence in the opinion of Lord LANGDALE, observed that it could not be suggested that the purpose contemplated by the commissioners was a proper application of the funds authorized to be raised, unless it could be held as coming under the words "otherwise in carrying this Act into execution." His Lordship then proceeded as follows:—

In the case of *Bright v. North (a)* the section relied upon by the Lord Chancellor authorized the parties to raise a rate of a certain amount, and directed them * to apply the funds in * 230 doing, constructing, and executing all such works, acts, matters, and things as they should from time to time deem necessary, proper, or expedient for putting the banks of the rivers therein mentioned into and maintaining the same in a permanent state of stability; and the Act thus giving to the parties a distinct authority to apply the funds for maintaining the works contemplated in a permanent state of stability, the Lord Chancellor held that by a reasonable construction they would be empowered to resist any Act likely to be injurious to those works.

Applying this reasoning to the present case, we find that the commissioners are authorized to apply the funds for certain specified purposes, and "otherwise in carrying this Act into execution." Now, if other parties had been applying for an Act that would have the effect of supplying water to Southampton, I think that the doctrine laid down in *Bright v. North (b)* would authorize these commissioners in applying a portion of the funds in resisting that which, if not resisted, would prevent them from carrying the present Act into execution; but here there is nothing of the sort. The object of the Act being to get a supply of water for the town of Southampton, the commissioners find that the supply is not large enough, and therefore wish to have another Act containing more extensive powers. This cannot be said to be a carrying of the existing Act into execution, nor to be within the scope and spirit of that which was the object of the legislature in passing the Act. I apprehend that it is clearly an application of the funds, which cannot be upheld, and that the order of the Vice-Chancellor is perfectly right. The appeal must therefore be dismissed with costs.

(a) 2 Phil. 216.

(b) 2 Phil. 216.

1850. June 24, 25. Before The Lords Commissioners Lord LANGDALE and Mr. Baron ROLFE.

Whether in the condition of copyright mentioned in the 4th section of the Designs Copyright Act (5 & 6 Vict. c. 100), that the design has before publication been registered, the term publication is limited to publication after the design has been embodied and introduced into some fabric, *quære*.

A party is entitled to move to dissolve an injunction, if, from ambiguity in its terms, he may under any construction of the order be prejudicially affected.

It is the duty of a party asking for an injunction to bring under the notice of the Court all facts material to the determination of his right to that injunction; and it is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward.

Thus where a plaintiff obtained an *ex parte* injunction on the facts stated in the bill, but other facts came out in the defendant's answer raising a question of law on which the right of the plaintiff to the injunction depended: *Held*, that the omission of the plaintiff to bring these facts under the notice of the Court was of itself a sufficient ground for dissolving the injunction.² Injunction doubtful to be dealt with, pp. 239, 243.

Principles on which the Court acts on an application for an injunction to restrain a party from prosecuting a legal right.

THIS was a motion on the part of the plaintiffs to discharge or vary an order of the Vice-Chancellor of England, bearing date the 17th April, 1850, dissolving an injunction, obtained *ex parte* by the plaintiffs, whereby the defendant was restrained from applying the design in the plaintiffs' bill mentioned, or any other design being the same or a fraudulent imitation thereof, for the purpose of sale, to the ornamenting of any calico or other woven fabric, and from publishing, selling, or exposing for sale any such calico or other woven fabric as aforesaid to which such design or any design being the same as or a fraudulent imitation thereof should have been so applied, during the term of nine calendar

¹ S. C., 14 Jur. 945; 2 H. & T. 437.

² Where an injunction has been granted on an *ex parte* application, it will be dissolved, without regard to the merits, if any material facts have been suppressed. *Hilton v. Earl Granville*, 4 Beav. 130; C. & P. 283; *Clifton v. Robinson*, 16 Beav. 355; *Hemphill v. M'Kenna*, 3 Dr. & Wr. 183; *Sturgeon v. Hooker*, 1 De G. & S. 484; *Castelli v. Cook*, 7 Hare, 89, 94; 13 Jur. 675; *Pinchin v. London and Blackwall Railway Co.*, 5 De G., M. & G. 851; 17 Jur. 241; *Phillips v. Frichard*, 1 Jur. N. S. 750, V. C. W.; *Fuller v. Taylor*, 9 Jur. N. S. 743; 11 W. R. 532, V. C. W.; 2 Dan. Ch. Pr. (4th Am. ed.) 1506.

months to be computed from the 9th December, 1848, until answer or further order.

The bill, which was filed on the 21st July, 1849, by A. S. DalGLISH and R. DalGLISH, calico-printers at Manchester, stated that, previously to the 9th December, 1848, Leopold Bernheim, an individual in their employ, * at their expense, and for their * 232 use and benefit, had invented and designed a certain new and original design applicable to muslin, calico, and other woven fabrics, specified in class No. 10 in the Act 5 & 6 Vict. c. 100, which they had, on the 9th December, 1848, duly registered according to the provisions of the Acts 5 & 6 Vict. c. 100, and 6 & 7 Vict. c. 68; that on the 10th July, 1849, they had been informed that the defendant had been exposing for sale, and in fact had sold, certain printed calico containing a design which was a copy, or fraudulent imitation, of the said registered design. The bill then prayed an injunction, and an account of the sales of the pirated design, and a delivery up to the plaintiffs, or the destruction, of all such calicoes and other fabrics, and the plates on which such design was engraved, the plaintiffs waiving all penalties and forfeitures which the defendant might have incurred. On the 23d July, 1849, the plaintiffs obtained an injunction *ex parte*, in the terms above stated.

On the 19th October, 1849, the defendant put in his answer, by which he stated, that the pattern or design, in the bill alleged to have been fraudulently imitated and applied by the defendant, was published by the exhibition thereof to divers persons at the warehouse or place of business of the plaintiffs at Manchester, and according to the common course of their business, by the space of two months next preceding the 9th December, 1848 (being the day when the pattern or design was by the bill stated to have been registered), and that the defendant being, at and prior to the 9th December, 1848, an assistant salesman in the employ of the plaintiffs as such calico-printers, did, under their sanction and authority, so exhibit and publish the said pattern or design before the same had been registered or engraved. * The answer * 233 then alleged, that, by and according to the course of the business of the plaintiffs as regulated by them while the defendant was so in their employ, he the defendant did in each week, and as part of his ordinary duty, collect patterns of other printers, and that such of the last-mentioned patterns as were liked by the

plaintiffs were pasted into books for the use of the designers from time to time employed by the plaintiffs, and for the purpose of supplying such designers with hints, ideas, or suggestions for new patterns; that Leopold Bernheim in the bill named was one of such designers for whose use or assistance while in such employ the patterns of other printers were so collected; that from time to time when new patterns were produced by the designers, one copy thereof was made for the use of the pattern engraver, and other copies thereof were, according to the system of business of the plaintiffs, prepared in a variety of colours for the purpose of showing the effect of such patterns, and were then entered in a book kept by the plaintiffs for exhibition to their customers, so as to enable the plaintiffs to select orders for goods to be printed with or according to the designs appearing in such book of patterns; that the pattern in the bill alleged to have been fraudulently imitated, having been so prepared and entered in such book, was by T. C. Aitchison as salesman, and by the defendant as assistant salesman, of the plaintiffs, and also by Mr. Adams, another salesman of the plaintiffs, and with and under their sanction and authority, shown and exhibited at the warehouse or place of business of the plaintiffs at Manchester, to most of the customers of the plaintiffs, and to at least one hundred such persons in the course of two months before the 9th December, 1848, and also before and during the engraving of the said design for the plaintiffs' use; that the defendant, and T. C. Aitchison,

* 234 * and Mr. Adams, with the privity of the plaintiffs, exerted themselves so to exhibit and expose the same design, in order to induce the customers to give such orders, and that the defendant, and T. C. Aitchison, and Mr. Adams upon such occasions solicited such orders; that the plaintiffs had it in their power to register the same pattern or design by the space of two months prior to the 9th December, 1848, but purposely (and according to their common course of business in that behalf) deferred such registration until, by such exhibition thereof, orders were obtained for the same to a sufficiently remunerative amount, and that such course of business was taken or followed by the plaintiffs for the purpose of avoiding the expense of producing such patterns in different colours in cloth to take orders from, and the expense and trouble of registration in case any pattern so prepared should not be successful in attracting customers. The

defendant admitted the sale of one hundred and twenty-five pieces of calico with the alleged pirated design, and the possession of one hundred and fifty pieces of the same pattern, but refused to give any account of the sales until the plaintiffs had established their legal right, which he altogether denied, both on the ground of a dedication to the public, and because the pattern or design had been copied from the French.

The nine months' copyright granted by the Act 5 & 6 Vict. c. 100 having expired, the defendant's solicitor, on the 10th January, 1850, applied by letter to the plaintiffs' solicitor to consent to the dismissal of the bill. This letter not being answered, the defendant moved before the Vice-Chancellor of England to dissolve the injunction. His Honor dissolved the injunction with costs, on the ground that it had been obtained on an affidavit, which did not allude to the * circumstances disclosed by the answer, * 285 and therein alleged to have amounted to a dedication of the design to the public. The bill was subsequently amended, introducing the facts which the answer referred to as disentitling the plaintiffs to any copyright in the design, and denying the legal conclusion sought to be drawn from them by the defendant.

Mr. Rolt and *Mr. W. T. S. Daniel*, for the plaintiffs, in support of the appeal motion.—No application was made to dissolve the injunction until after it had become inoperative and the term of copyright had expired. It was not ripe for the Court to enter into the question of dedication until the hearing of the cause, and the motion ought to have been ordered to stand over until the hearing. The plaintiffs' construction of the Act is the reasonable and right construction, for a publication of a design can only be intended when that design is embodied and introduced into a fabric. By the Acts 27 Geo. 3, c. 38, and 34 Geo. 3, c. 28, which are *in pari materia*, the protection or copyright is to commence from the day of publication, "which shall be truly printed with the name of the printer or proprietor at each end of every such piece of linen, cotton, calico, or muslin." Although these Acts are now repealed, yet, so far as they serve to illustrate the definition of the word "publication," they may be referred to, and they clearly show that it is not the design which is intended to be protected, but the printed fabric: the words in the 4th section of the Act 5 & 6 Vict. c. 100,

“unless such design have before publication thereof been registered,” &c., must therefore be so construed.

[THE LORD COMMISSIONER LORD LANGDALE. — Is it not a
* 236 publication of the design by a shopkeeper to * show it to a customer, and might not the legislature have extended the time to nine months with the express view of registering the design ?]

The last words of the 4th section bear out the construction for which the plaintiffs contend, for by them the marks denoting a registered design are, “to be put on such article of manufacture or such substance, either by making the same in or on the material itself of which such article or substance shall consist, or by attaching thereto a label containing such marks.” There is no limit set to the protection of the design until it is printed, for the legislature will only protect skill in connection with capital ; and it surely cannot be argued, that in the case of a modeller, who takes a cast to several silversmiths in succession, the last of whom adopts it, there has been a publication by showing it to those who have rejected it. The charge of concealment brought against the plaintiffs can only be made out by establishing the defendant’s construction of an Act of Parliament, which construction it is submitted is erroneous, and the charge must therefore fall to the ground.

[THE LORD COMMISSIONER LORD LANGDALE. — The question on the Act is one of great importance ; but, so far as the parties are concerned, it is at an end ; and the Court will not give an opinion on a matter not properly before it.]

Mr. Roundell Palmer and *Mr. H. Prendergast*, for the defendant, contra. — As to the application to dissolve being made after the injunction has become inoperative, it has been decided that a bill may be filed to protect the sale of a pirated article after
* 237 the expiration of the term * for which it had been protected, *Crossley v. Beverley* ; (a) and it is to be observed, that the injunction is to restrain the sale of any article which had been

(a) 1 Russ. & M. 166, reported in note to *Sheriff v. Coates*, *ib.* 159.

piratically made during the existence of the protection. So long, therefore, as the injunction continues, the defendant is interdicted from selling the 150 pieces of the article which he has admitted to be in his hands. It would have been quite unjust to have brought the case to a hearing only for the purpose of deciding a question whether the injunction was to be sustained or not, when the injunction had become inoperative. There are two points on this motion; first, whether, under the circumstances of the exposure to view of the design on paper, such an injunction should ever have been granted at all; and, secondly, whether the facts stated in the answer are not so material to the question in the cause, that they ought to have been brought before the Court on the motion for the injunction. The words in the repealed Acts which have been referred to are not in the existing Act, and by those Acts registration is not required on the article itself; they cannot therefore be imported into the existing Act for the purpose of defining the meaning of the term "publication." This is not the case of a private negotiation, as that suggested of a modeller taking his cast to a silversmith, but of an habitual systematic exposure in the plaintiffs' shop of the design on paper. The legislature has distinguished the design from its application; and the thing to be protected is the design with the view of being applied. The words of the 3d section of the Act 5 & 6 Vict. c. 100 prove this, "whether such design be applicable," &c.; and the 15th section requires only copies, drawings, or prints of the design * to be furnished * 238 to the registrar. As to the policy of the Act, if the exposure to sale of a design not applied, was not to be deemed a publication, a book of designs might be purchased, after which the designer might register any one of his designs, and then file his bill to restrain the sale of an article which the purchaser might have manufactured. All Acts of monopolies are to be construed in favour of the public, and against the monopolist. There could be no use in limiting the term to nine months, unless it was deemed sufficient; but the construction contended for by the plaintiffs is to anticipate the monopoly for as long a time as possible at the risk only of a previous publication. There has also in this case been a suppression of information on the part of the plaintiffs which, of itself, is sufficient to dissolve the injunction.

[THE LORD COMMISSIONER LORD LANGDALE. — It is quite clear that

every fact must be stated, or, even if there is evidence enough to sustain the injunction, it will be dissolved.]

Where the Court entertains the least doubt as to the legal right, it will not exercise its jurisdiction by injunction. *Spottiswoode v. Clarke.* (a) [They also referred to *Prince Albert v. Strange.* (b)]

Mr. Rolt, in reply, urged that the true test of the applicability of a design was its application to some particular fabric; that if the period of nine months was to run from the time when the drawing was made, the whole period of protection might be absorbed in manufacturing the article to which the design was to be * 239 applied. With respect to the alleged suppression of * any part of the case, he submitted that, unless it could be shown that the facts alleged to have been suppressed were material, or had been the subject of discussion between the parties, or that the plaintiffs were aware that such a case would be made by the defendant, the injunction ought not to be dissolved; and that according to the plaintiffs' construction of the Act of Parliament, there was clearly no suppression.

THE LORD COMMISSIONER LORD LANGDALE. — The order for the injunction in this case divides itself into two parts: by the first the defendant is restrained from applying the design, and by the second from selling or exposing for sale any calico or other woven fabric, to which such design or any design being the same as or a fraudulent imitation of it shall have been so applied. The words which immediately follow, viz., “during the term of nine calendar months, to be computed from the 9th day of December, 1848,” are alleged to be applicable to both members of the sentence; and indeed, if they are not to be applied to the order restraining the application of the design, there would be no limit to the operation of the first part of the order, which would be contrary to the law of the case. If they are only to be applied to the last part of the order, then the defendant would be merely restrained from selling the things to which the design was applied during that time.

Now I am clearly of opinion that a party (if entitled to be relieved at all) has a right to be relieved from an order which is in

(a) 2 Phil. 154.

(b) *Ante*, Vol. I. p. 25.

its terms ambiguous, and therefore that this was a proper subject of application to the Vice-Chancellor of England, and is also a proper subject to be considered here. I should not, * how- * 240
 ever, have been of this opinion, if the case had been such that there really was no substantial order from which the defendant could ask to be relieved, and if nothing but costs was to be discussed. Where the rights of parties are at an end, or where the circumstances are such that they are incapable of being determined, I consider it is very improper to continue an expensive litigation in this Court merely for the purpose of ascertaining what costs would have been given if the right had been determined one way or the other. I have, however, on more than one occasion allowed a short application to be made for deciding the question of costs, without going on with a long litigation, for the pretended purpose of determining the question in the cause, when there really was no purpose to be answered but the matter of costs.¹

It remains then to be determined what ought to have been done upon the application to the Vice-Chancellor of England. The plaintiffs alleging themselves to be entitled to a certain design applicable to manufactures, filed their bill in the month of July, 1849. The rights which they had were limited to the period which elapsed between the 19th December, 1848, and the 19th September, 1849; and the application for the injunction was made in July, 1849. The order, which was in the terms already mentioned, seems to me to be capable of being so construed as that the defendant was not to be allowed to make articles to which the invention or design applied during the term of protection; and it appears by the answer that the defendant has in his possession 150 pieces of goods to which the invention had been applied during the term. Now these were goods, which, if the plaintiffs had not the right which they claimed, the defendant was free to dispose
 * of to his own advantage, and this Court would not have * 241

¹ If, upon hearing the motion to dissolve an injunction, the Court is of opinion that the injunction was obtained by a suppression of material facts, or that it was improperly granted, or that the case made by the plaintiff is contradicted or not properly supported, it will order the injunction to be dissolved, either with or without costs, as the justice of the case may require. *Great Western Railway Co. v. Oxford, Worcester, and Wolverhampton Railway Co.*, 5 De G. & S. 437; *Rochdale Canal Co. v. King*, 2 Sim. N. S. 78; 15 Jur. 962; *Cory v. Yarmouth and Norwich Railway Co.*, 3 Hare, 593; 2 Dan. Ch. Pr. (4th Am. ed.) 1506, 1516.

had any right to prevent his doing so. What then is the plaintiffs' case? They state the fact of the registry, and that there had been no publication, but do not state any of the facts which afterwards appear upon the answer of the defendant. (His Lordship here referred to the passages of the answer above set forth.)

These facts then, which might suppose a construction of the statute contrary to the allegations in the bill, do not appear on the bill, but come out in the answer. There is, therefore, a question of law, whether having regard to the facts thus appearing, the plaintiffs are entitled to the protection they ask; and there is also a question of practice, whether the facts stated in the answer being material to the determination of the question, and being within the knowledge of the plaintiffs by whom the case was brought forward, and who obtained an *ex parte* injunction upon their own statement, whether the omission of the statement of these facts in the bill does not constitute a reason why the *ex parte* injunction so obtained should be dissolved. Now when this case came before the Vice-Chancellor of England, it was competent for his Honor either to have determined the law by refusing the injunction, or to have left the parties to go to law; or he might have dissolved the injunction as not properly obtained, it being the duty of a party who comes for an injunction the effect of which is to deprive another of his legal right, to ascertain for himself what are the facts which are material to be brought forward, and it being no excuse for him to say that he was not aware of their importance.

* 242 *Thus if the order of the Vice-Chancellor of England was not right on the grounds on which it was made, I think his Honor might still be perfectly right in dissolving the injunction without deciding upon the question of law between the parties; for he might most reasonably have supposed that the nature of the question raised was such, that it was not fit for the interference of the Court, or was a point to be ascertained in a Court of Law before this Court was called upon to interfere. Now with regard to that point I will say a word or two. The judgment of Lord COTTENHAM in *Spottiswoode v. Clarke* (a) to which reference has been made, does not give the whole of the circumstances that are to be taken

(a) 2 Phil. 154.

into consideration in a case of this kind. When a plaintiff comes for an injunction to restrain the defendant from the prosecution of his legal right, there are several things to be considered: not only is the amount of the injury which may be done to be taken into account, but also the extent to which the decision at law upon the subject could go, and the degree of certainty, more or less, in reference to that decision. Taking these several matters into consideration, the Court will in some cases refuse to interfere at all, and in others refuse to interfere otherwise than by postponing the question for a time, and giving the opportunity of bringing an action in the mean while. But in certain other cases, where justice cannot be done without it between the parties, the Court, notwithstanding the inconvenience, will grant the injunction in the first instance, and will not leave the party to any other course of proceeding to ascertain the legal right. Which of these courses is the proper one to be followed must depend on all the circumstances of each particular case; and I think it is * dangerous to lay down that the Court must interfere in a case of such a nature as the present. I think that the injunction here might very well have been dissolved without determining the question of law, and also without determining that there was such an omission on the part of the plaintiff as to make it reasonable to dissolve it upon that account. * 243

Upon the whole circumstances therefore of the case, and without venturing to proceed to a construction of the Act, which I do not think quite so easy as may be supposed, I think the Vice-Chancellor's order for dissolving the injunction to have been right.

THE LORD COMMISSIONER MR. BARON ROLFE. — I also think that the order of the Vice-Chancellor was perfectly right. The point I had the most doubt about was, whether there was in truth any injunction existing which required to be dissolved; but I confess that the discussion has perfectly satisfied me on that point, and that it is not to be left in doubt whether the party is to be liable to be attached hereafter for a breach of this injunction.

I have nothing to add to what Lord LANGDALE has said upon the general merits of the case; but upon one point it seems to me proper to add thus much, namely, that the application for a special injunction is very much governed by the same principles which govern insurances, matters which are said to require the utmost

degree of good faith, "*uberrima fides*." In cases of insurance a party is required not only to state all matters within his knowledge, which he believes to be material to the question of the insurance, but all which in point of fact are so. If he conceals

any thing that he knows to be material, it is a fraud; but * 244 besides that, if * he conceals any thing that may influence the rate of premium which the underwriter may require, although he does not know that it would have that effect, such concealment entirely vitiates the policy. So here, if the party applying for a special injunction, abstains from stating facts which the Court thinks are most material to enable it to form its judgment, he disentitles himself to that relief which he asks the Court to grant.¹ I think, therefore, that the injunction must fall to the ground.

BURBIDGE v. ROBINSON.

1850. June 26. Before the Lords Commissioners Lord LANGDALE and Mr. Baron ROLFE.

One of several defendants by his answer admitted the possession of documents, but by an affidavit subsequently filed stated that since his answer he had deposited them with one of his co-defendants. A motion for their production refused in the absence of the co-defendant.²

THIS was an application on the part of the defendant W. Robinson to discharge an order of the Vice-Chancellor of England, dated the 8th June, 1850, ordering the production by the defendant W. Robinson in the usual way of, among other documents, three bills of exchange, admitted by him in his answer to be in his possession.

The object of the suit was to impeach the bills in question; and an injunction had been obtained by the plaintiff restraining execution in an action at law for the amount of the bills. In this action a judgment had been recovered, on which the defendants in equity were proceeding to outlaw the plaintiff.

The defendant W. Robinson, by his answer, admitted the possession of the bills, but by an affidavit subsequently filed, stated that

¹ *Ante*, 231, notes and cases.

² See 2 Dan. Ch. Pr. (4th Am. ed.) 1824, 1827.

he had since placed them in the hands of Robert Cook, another of the defendants, as a security for money due by him, W. Robinson, to R. Cook. The *defendant W. Robinson * 245 offered to procure the inspection of the bills, but objected to their being produced in the usual way.

Mr. Stuart and *Mr. Martindale*, in support of the application, contended, that the order of the Vice-Chancellor was wrong in form, as being made on W. Robinson only; that the bills of exchange, being in fact the title deeds of the defendant, ought not to have been ordered to be delivered up. They referred to *Taylor v. Rundell*; (a) *Blenkinsopp v. Blenkinsopp*; (b) *The Mayor of Berwick v. Murray*. (c)

Mr. Rolt and *Mr. Bazalgette*, for the plaintiff, and in support of the Vice-Chancellor's order. — The answer having admitted the possession of the bills, and the parting with them being subsequent to the answer, the Court will enforce against the defendant the plaintiff's right to a production. The right of the plaintiff to the production is clear, for there is nothing alleged to show that the bills are wanted by the defendant for any legitimate purpose. The case of *The Mayor of Berwick v. Murray* (c) is distinguishable from the present.

Without calling for a reply,

THE LORD COMMISSIONER LORD LANGDALE delivered the judgment of the Court as follows: The rule as to the production of documents is one in acting upon which great attention is required; it ought, however, to be strictly enforced. If the documents in question had been in the possession of W. Robinson, we should not have considered that the order made by the *Vice- * 246 Chancellor ought to be disturbed, the general rule being that the plaintiff is entitled to production when possession is admitted by the defendant. Nor should we have been disposed to vary the order, if, after hearing the parties, the Vice-Chancellor had exercised his discretion as to the mode of production. The answer of the defendant admits the possession; but it is not

(a) 1 Cr. & P. 104.

(b) 2 Phil. 607.

(c) *Ante*, Vol. I. p. 530.

doubted that an affidavit may be used to explain why, notwithstanding such admission, the defendant is entitled to a protection which he did claim by his answer. Here it appears that the defendant has parted with the documents, and that they are now in the hands of another party. The effect, therefore, of making the order must be to direct the defendant to do an act which it is not in his power to perform, for this is not like the case of documents in the hands of a solicitor over whom the client has a control. The defendant R. Cook has an interest in these bills, and the Court is asked to make an order affecting this interest in his absence.

Without, therefore, going into the use which may be made of these documents, and looking at the fact that we are asked to make an order which it may be impossible for the defendant to obey, and one which affects the interest of a party in his absence, we think that the three bills of exchange ought to be excepted from the order to produce.

* 247 *The ATTORNEY-GENERAL v. The Corporation of LONDON.

1849. December 8, 13, 14, 17. 1850. January 14. Before the Lord Chancellor Lord COTTENHAM.

A plaintiff is entitled to discovery from the defendant, not only of that which constitutes his, the plaintiff's, title, but also for the purpose of repelling what he anticipates will be the case set up by the defendant. This does not extend, however, to a discovery of the evidence upon which the anticipated case of the defendant is to be supported.¹

The object of the Act 21 Jac. 1, c. 14, was to put a defendant litigating with the

¹ The right of a plaintiff in equity to the benefit of a defendant's oath, is limited to a discovery of such material facts as relate to the plaintiff's case, and does not extend to a discovery of the manner in which, or of the evidence by means of which, the defendant's case is to be established. *Wigram on Disc.* 261; *Ingilby v. Shafto*, 33 Beav. 31; 9 Jur. N. S. 1141; *Daw v. Eley*, 2 H. & M. 725; *Hoffmann v. Postill*, L. R. 4 Ch. Ap. 673; *Wilson v. Webber*, 2 Gray, 558; *Haskell v. Haskell*, 3 Cush. 540, 542, 543; *Bellowes v. Stone*, 18 N. H. 465, 483, 484; *Story Eq. Pl.* §§ 572-574, c.; *Cullison v. Bosson*, 1 Md. Ch. Dec. 95; *Howell v. Ashmore*, 1 Stockt. N. J. 87, 88. But see *Adams v. Porter*, 1 Cush. 170, in which the English rule above stated was held not to be applicable

Crown in the same situation as any other defendant; but this statute does not apply in equity, where, in the matter of discovery, the Crown and a subject litigating together are precisely on the same footing as ordinary parties. *Semble*, a defendant cannot protect himself from discovery on the ground of disclosing the evidence of his title, where his only allegation of title is negating the title of the plaintiff.

Where the bill charges that the defendant is in possession of documents which relate to the matters in question in the suit, the defendant cannot protect himself from setting out a list and description of such documents by merely alleging his belief that they do not contain evidence of or tend to show the plaintiff's title, but he is bound distinctly to negative the allegations in the bill.¹

The authorities on the above points examined and commented on.

An agent cannot get an adverse title, unless he can distinctly show that the acts on which he relies are in respect of title, and not in respect of agency.²

In a suit by the Attorney-General the general rule as to costs is, that, as the Crown does not pay costs, the Attorney-General does not receive costs where, if a private individual, he could have been called on to pay them. Where, however, if a private individual he could not have been called on to pay costs, the rule does not apply.³

Thus, in a case where the Attorney-General had excepted to the defendant's answer for insufficiency, and the exceptions had been allowed by the Master: *Held*, on affirming this decision, by the Master of the Rolls and subsequently

in Massachusetts. This rule does not extend to defeat the plaintiff of his right to discovery from the defendant, where he makes a case in his bill which, if admitted, would disprove the truth of, or otherwise invalidate the defence made, to the bill; in such cases, he is entitled to discovery from the defendant, of all which may enable him to impeach the defendant's case; for the plaintiff does not rest on a mere negative of the defendant's case, but insists upon some positive ground entitling him to the assistance of the Court, such as fraud, or other circumstances of equitable cognizance to a discovery of which, no objection of this kind can be raised. *Hare* on Disc. 201; *Bellows v. Stone*, 18 N. H. 465, 483-485; *Daw v. Eley*, 2 H. & M. 725; 1 Dan. Ch. Pr. (4th Am. ed.) 579, 580, and cases in notes. In answering interrogatories filed by a defendant for the examination of the plaintiff, under the English practice, the general rule applies, that he who is bound to answer must answer fully. Such interrogatories stand on a different footing from those for the examination of a defendant in this respect, that a plaintiff is not entitled to a discovery of the defendant's case, but a defendant may ask any questions tending to destroy the plaintiff's claim. *Hoffmann v. Postill*, L. R. 4 Ch. Ap. 673.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1829, 1831, 1832; *Harris v. Harris*, 4 Hare, 179, 184; 9 Jur. 80; *Greenwood v. Greenwood*, 6 W. R. 119, V. C. K.; *Felkin v. Lord Herbert*, 9 W. R. 756, V. C. K.; *Stainton v. Chadwick*, 3 M'N. & G. 575, 584; 15 Jur. 1139; *Cannock v. Jauncey*, 1 Drew. 497; *Patch v. Ward*, 14 W. R. 166, V. C. S.

² See *Holland v. Long*, 7 Gray, 486.

³ See 1 Dan. Ch. Pr. (4th Am. ed.) 11, 12.

on appeal by the Lord Chancellor, that the Attorney-General was entitled to costs, the rule being that a party who merely supports the decision of a competent jurisdiction is never called on to pay the costs of so doing.

The decision of the House of Lords on the question of costs in the case of *The Corporation of London v. The Attorney-General*, 1 H. L. 471, observed upon.

THE information in this case was filed, *ex officio*, by Sir Frederick Pollock, her Majesty's Attorney-General, on the 15th February, 1844, for the purpose of determining the respective rights of the Crown and of the Corporation of the City of London in the soil and bed of the river Thames, and of the shores thereof, between certain limits.

* 248 * To this information the corporation demurred, and, on the 17th April, 1845, their demurrer was overruled by the Master of the Rolls, (a) whose decision was, on the 13th March, 1848, confirmed on appeal by the House of Lords. (b) An answer was then put in by the corporation, and to this answer the Attorney-General took five exceptions, which were allowed by the Master. The corporation excepted to the Master's report, and their exceptions having been overruled with costs by the Master of the Rolls, (c) they now appealed, both on the question of sufficiency and on that of the costs, to the Lord Chancellor.

In order to render intelligible the points under discussion, it becomes necessary to make the following statement of the pleadings in the suit.

The information stated the right of the Crown to the matters in question, to the following effect: That by the royal prerogative, the ground and soil of the coasts and shores of the sea round this kingdom, and the ground and soil of every port, haven, and arm of the sea, creek, pool, and navigable river thereof into which the sea ebbs and flows, and also the shore lying between high-water mark and low-water mark at ordinary tides, belong to her Majesty, and her Majesty has a right of empire or government over the navigable rivers of the kingdom; that her Majesty and her progenitors time out of mind, is and have been seised in right of the Crown of England of and in the port and haven of London, and of the river Thames, the same being an arm of the sea into which the sea has always flowed and reflowed; and that the same

(a) 8 Beav. 270.

(c) 12 Beav. 8, and 171.

(b) 1 H. L. 440.

river is * also, and from time immemorial has been, an * 249 ancient, royal, and navigable river and king's highway for all persons, with their ships, vessels, boats,* and crafts to pass, repass, and navigate at their free will and pleasure, and to moor their vessels in convenient parts of the river, not impeding the navigation.

The information then stated, that the mayor or the Corporation of London had, for a very long period, either by prescription or under some grant from the Crown, exercised the office of conservator of the river, and that the corporation had lately claimed, not only to exercise by the mayor such office of conservator, but had also claimed the freehold of the soil and bed of the river, and of the shores between high and low water mark within the same limits in which the office of conservator was exercised. It then alleged that, under such claim, the corporation had made grants to various parties, enabling them to embank the soil of the river, and to build thereon between high and low water mark, and charged that these grants were bad, inasmuch as the corporation had not the title to the freehold which they claimed, and inasmuch, also, as these grants were injurious to the navigation of the river, and, therefore, to permit them would be contrary to the duty of the corporation as exercising the office of conservator.

The information then charged, that the defendants pretended that the corporation had such title to the freehold of the soil and bed and shores of the river, as before stated, under some grant from the Crown, and met this pretence by a charge that no charter or letters-patent given or granted by any of her Majesty's predecessors, contained any grant of the soil and bed of the river, or of the shores thereof * between high and low * 250 water mark, to the Corporation of London. It then charged, that the defendants pretended that they had some charters which did not contain any grant of the soil and bed or shores of the river, but which recognized such grant; and it met this pretence by charging, that in no charter granted to the city of London, had any immemorial right of the corporation to the ownership of the soil and bed and shores of the river, as arising from any previous grant, been recognized and confirmed. It then charged, as another pretence of the defendants, a grant or charter of the 23 Hen. 6, including a grant of the matters in question; and met this by charging, that such charter was of no force and effect to

pass to the corporation the soil, bed, and shores of the river, and that, if the language of the charter were sufficient for that purpose, the same charter had been subsequently revoked or annulled. It then charged, that the defendants pretended that they had a right to the soil and bed and shores of the river, founded on immemorial usage, proved by certain acts of ownership; and it met this pretence by charging that no sufficient acts of ownership could be shown as evidence that the pretended right of the corporation to the soil and bed and shores of the river was founded on immemorial usage. It then charged that, even if the soil and bed of the river and the shores thereof between high and low water mark had been granted to the corporation, yet, inasmuch as the embankments were a nuisance, such ownership of the soil and bed and shores of the river, as claimed by the corporation, would not authorize the grants made by the corporation. It then charged, that the defendants had in their possession some charters, letters-patent, &c., relating to the matters aforesaid, whereby the truth of the several matters thereinbefore mentioned would appear.

* 251 * The information contained specific interrogatories, founded on the above charges, for the purpose of obtaining discovery, first, as to the charters alleged by the defendants to contain a grant of the bed and soil and shores of the river; secondly, as to the charters alleged to contain a recognition of such grant; thirdly, as to the charter of the 23 Hen. 6; fourthly, as to the alleged acts of ownership in evidence of immemorial usage; and fifthly, as to the documents generally in the possession of the defendants.

The answer of the corporation denied the title of the Crown to the bed and soil and banks of the river, within the limits in the information mentioned. The defendants submitted, as a matter of law, whether the Crown had such general right as in the information alleged. They claimed to have been, from time immemorial, seised and possessed of, and well entitled unto, and to have been in the actual uninterrupted possession of, by the exercise of acts of ownership, the bed and soil of the river Thames and the banks and shores thereof between high and low water mark, and to have been for all the time aforesaid, in the actual and exclusive exercise and enjoyment of all such rights and powers as belonged to and were capable of being exercised and

enjoyed by the owner of the legal estate and interest in the bed and soil and banks of the said river within the limits in question. They admitted that they had, by the mayor, held the office of conservator of the river; but submitted, that their rights as such conservator, were distinct from, but were compatible with, their rights of ownership.

With respect to the first four heads of discovery sought by the information as above stated, the defendants submitted, that to compel such discovery would * be to violate the spirit * 252 and intention of the statute 21 Jac. 1, c. 14 (of which they claimed the benefit), and a subversion of the common-law right and principle, that the claimant of an estate of freehold shall recover by the strength of his own title, and shall have no right to a discovery of the title by which such estate is held.

With regard to the fifth head of discovery, which related to the documents, they admitted that they had in their possession certain deeds, instruments, charters, letters-patent, &c., relating to, and touching and concerning the said right and title of the defendants to the freehold of the bed and soil of the said river Thames and the enjoyment thereof, all which several deeds, instruments, charters, letters-patent, &c., evidenced and shewed, or tended to evidence and show, such right and title of the defendants as aforesaid, and all which the defendants were advised and believed formed material parts of the evidence possessed by the defendants of their aforesaid right and title, and all which were intended to be made use of and given in evidence by the defendants in support of their said right and title in this cause, and none of which said several deeds, instruments, charters, letters-patent, &c., did, as the defendants were advised and believed, evidence or tend to show or prove the pretended and alleged right of the Crown set up in the information, nor would the informant derive any proof in support of his case, from the production of such deeds, instruments, charters, letters-patent, &c., or any or either of them; but the defendants said that they could not specify or describe such deeds, instruments, charters, letters-patent, &c., or any or either of them, in any list or schedule without, as they were advised and believed, disclosing the nature and character of the * evi- * 253 dence on which they intended to rely as proof of their aforesaid right and title; and, therefore, under the circumstances

therein stated, the defendants submitted and insisted that they were not bound, and ought not to be compelled, to set forth a list or schedule of such deeds, instruments, charters, letters-patent, &c. The defendants admitted the possession of other documents relating to the matters in the information mentioned other than the title of the defendants to the bed and soil of the river, a list of which they set forth in the schedule, and save as aforesaid they denied, &c.

The exceptions taken by the Attorney-General complained of the answer as insufficient, in not having answered the interrogatories relating to the five heads of discovery above mentioned.

The following are the interrogatories to which the first four of these exceptions severally referred. First, "whether it is not true that no charter or letters-patent given or granted by any of her Majesty's predecessors, kings or queens of this realm, contain any grant of the ground, soil, or bed of the river Thames, or of the shores thereof between high and low water mark, to the mayor, commonalty, and citizens, or how do the defendants make out the contrary; and that the defendants may discover and set forth, under or by what charter or letters-patent or other grant they claim to be entitled to the freehold of the soil." Second, "whether it is not true that in no charter or charters granted to the city of London by any of her Majesty's predecessors, has any immemorial right of the mayor, commonalty, and citizens to the ownership of the soil, bed, and shores of the river, as arising from some previous grant as aforesaid, been recognized and confirmed, or

* 254 how do the defendants make out the contrary; * and that the defendants, the mayor, commonalty, and citizens may discover and set forth by what charters, or letters-patent, or other documents they maintain that the said pretended right is recognized and confirmed." Third, "whether it is not true that the charter or letters-patent of King Henry 6 is or are of no force and effect to pass or convey to the said mayor, commonalty, and citizens the said soil." Fourth, "whether it is not true that no sufficient acts of ownership on the part of the mayor, commonalty, and citizens, or other deeds, matters, or things can be shown, as evidence of such immemorial usage."

The fifth and last exception related to the general inquiry as to the possession of documents, the answer to which has been above set out.

Mr. Bethell, Mr. Sergeant Merewether, and Mr. Randell, for the defendants.

The Solicitor-General (Sir JOHN ROMILLY), and *Mr. Maule*, supported the decision of the Master of the Rolls.

Mr. Bethell, in reply.

The arguments on both sides, and the authorities cited in reference to the right to discovery, were so nearly the same as those used before the Master of the Rolls as reported in the 12th volume of *Mr. Beavan's Reports*, page 8, that it appears unnecessary to repeat them here, especially having regard to the full manner in which the case is entered into in the judgment of the Lord Chancellor.

* *Mr. Sergeant Merewether*, on behalf of the defendants, * 255 argued at great length, and cited very numerous authorities, in opposition to the general right of the Crown alleged in the information; but the Lord Chancellor, in the course of the argument, stated that this was not a question with which he could in any way deal on the present occasion.

On the question of costs, it was contended, on behalf of the defendants, that the Master of the Rolls was wrong in overruling the defendants' exceptions with costs; that the rule that the Crown, when suing in respect of its private revenue, neither pays nor receives costs, applied to the present case. The case of *Smith v. Earl of Stair and others*. (a) An unreported case before the House of Lords relating to the administration of the Duke of York's estate, and the decision of the House of Lords as to costs, in affirming the judgment of the Master of the Rolls on the demurrer in the present case, (b) were referred to in support of this argument. On the other side the following cases were cited. *The King v. Hassell*, (c) *The Attorney-General v. The Earl of Ashburnham*, (d) *The King v. Miles*, (e) *Attorney-General v. Levi*. (g)

(a) 6 Bell's App. Ca. 487; 18 Jur. 713.

(b) 1 H. L. 471.

(d) 1 S. & S. 394.

(c) 13 Price, 279.

(e) 7 T. R. 367.

(g) In the Exchequer, Michaelmas term, 1840. (Unreported.)

December 17.

THE LORD CHANCELLOR, after referring shortly to the general statements of title contained in the information, and to the pretences, and to the charges meeting those pretences, as above set out, and also to the answer of the defendants in reference to the question of title, proceeded as follows : —

* 256 * The defendants, by their answer, deny the title of the plaintiff to the bed and shores of the river ; they do not, it is true, set up any title in themselves other than what may arise from possession ; but still they distinctly allege their own right, and negative that of the plaintiff. Now nothing can be more clear, from authority and universal practice, than that a plaintiff is entitled to discovery not only of that which constitutes his own original title, but that he is also entitled to a discovery for the purpose of repelling what he anticipates will be the defence. Since replications have been disused, the plaintiff endeavours to obtain what he before would have got by a replication, by anticipating the defence if he knows what it is, and alleging those facts which, if true, would show that the defence is not available against him. An ordinary instance of this is a release which the plaintiff thinks he can impeach ; in such a case the bill leaves untouched the question of the original title, but anticipates that the defendant will set up a release, and on this supposition charges that which would prevent the operation of the release. But a more ordinary case, and one more adapted to the immediate circumstances of the present, is where a plaintiff anticipates the defence of purchase without notice. In this case the plaintiff makes the defendant pretend a purchase without notice, and then charges circumstances which would show that there was notice, so as to destroy the defence which he thinks will be set up.

This is the ordinary method where the plaintiff can anticipate what the defence will be ; but if a defence may be set up which he cannot anticipate, the universal practice (I shall see presently whether it is supported by authority), in order to meet the whole of the defendant's case, is, to ask the defendant what his

* 257 * defence is. It was said in argument that an answer has only two objects, the one for affording to the plaintiff the discovery of that which constitutes his title, and the other for enabling the defendant to set up what he relies upon as his defence ;

but I apprehend that there is, on the part of the plaintiff, a right in addition to that which is stated in this proposition, and that, independently of discovery to show his title, he is entitled to a discovery to repel the defence which he expects will be set up against it. For this we have the authority of Lord REDESDALE and the Vice-Chancellor WIGRAM. Lord REDESDALE says, (a) "The plaintiff has a right to the discovery of the case on which the defendant relies and of the manner in which he means to support it." Vice-Chancellor WIGRAM rather quarrels with the generality of this proposition, saying, however, (b) "That a plaintiff is entitled to a discovery of the case on which the defendant relies, that is, that the plaintiff is entitled to know what the case is, admits of no doubt;" nor does it admit of any doubt, for if the plaintiff apprehends that the defendant will not put some matter in issue which may constitute his defence, or if he wishes for more information about it than he thinks he is likely to get without putting such a question, he has a right to ask what the defence is. It is quite a different matter that he is not entitled to the evidence upon which that defence is intended to be supported; and I apprehend that the language of Lord REDESDALE has been rather misunderstood by Vice-Chancellor WIGRAM, because when Lord REDESDALE says that the plaintiff is entitled to a discovery of the case on which the defendant relies, and of the manner in which he means to support it, Lord REDESDALE does not * intend to say that * 258 he is entitled to all the evidence by which it is to be proved, but only that he has a right to know what the case is. It is not, therefore, enough for a defendant to deny the plaintiff's title and to assert his own, but he must also show how he derives his right, must show, in short, that he has a title which, if proved, would displace that of the plaintiff. It does not follow from this that the plaintiff is entitled to see the documents by which the defendant's title is proved; on the contrary, the authorities show that he is not; and Lord REDESDALE himself expressly draws that distinction; he says, (c) "Where the title of the defendant is not in privity, but inconsistent with the title made by the plaintiff, the defendant is not bound to discover the evidence of the title under which he claims." We have it, therefore, on the authority of Lord

(a) Mit. Pl. p. 9, ed. 4.

(b) Wigram on Discovery, p. 285, pl. 372, ed. 2.

(c) Mit. Pl. p. 190, ed. 4.

REDESDALE, that the plaintiff is entitled to know what the defendant's case is, and how he makes it out, but not to see the proofs by which that case is to be established.

Now it was said that the statute of James, as pleaded in the answer, gives a party against whom the Crown is litigating, an advantage different from that which belongs to every other defendant. I do not at all so understand it. The object of the statute was to put a party who was contesting with the Crown in the same situation as a party contesting with any other plaintiff; but here in equity the Crown and the subject always were on the same footing, and they are on the same footing now; there was no evil therefore to be remedied. At law, however, there was, arising

from technical reasoning, a great injury accruing to a defendant in litigation with the Crown. The Crown's *title was taken to be proved, unless a contrary title was set out and pleaded. That was a privilege which the Crown maintained against a defendant at law; but no such privilege has ever been asserted here; nor am I at all aware of there being any different rule, as far as discovery is concerned, applicable to a suit between the Crown and a subject, and a suit between ordinary parties.

It is to be considered, then, what it is that the defendants in the present case have set out. They have certainly negatived the plaintiff's title, but have not set out any distinct title in themselves, except that which arises, or may be inferred, from the absence of title in the plaintiff. They are conservators of the river, but they say that that conservancy is distinct from their title to the soil. No doubt it is; but it is not to be lost sight of, that it may nevertheless give an opportunity for what would be very important acts of ownership and jurisdiction over the Thames, if they were exercised by a party who had not that access which the right of conservancy gives to the defendants. An agent cannot well get an adverse title, unless he can very distinctly show that what he has done is in respect of title, and not in respect of his agency. That is exactly the situation in which the defendants stand; and in that view, in order hereafter to see how far acts of agency negative the plaintiff's title, for which purpose alone they could be used, by showing an adverse title in the defendants, it never can be lost sight of that the defendants are conservators. It has been argued, however, that this is not so, and that in point of fact the office of conservator is exercised by the Lord Mayor, and not by the cor-

poration. Now how that may be upon the charters I do not inquire; but I find upon the answer that there is a most distinct * statement that the defendants are themselves the * 260 conservators. The answer states that they exercise that jurisdiction by means of the Lord Mayor of London acting for them, but that the right to the conservancy is in the corporation. This statement is to be found in various passages; and that it may be stated more broadly than the charters warrant, is immaterial; it is sufficient for the present purpose to show that that is the title which the defendants claim.

We have already seen that the plaintiff is entitled, not only to a discovery of that which constitutes his title, but also to a discovery of every thing which may enable him to defeat the title which is expected to be set up against him.¹ In the cases of *Jones v. Davis*, (a) *Evans v. Harris*, (b) and *Harland v. Emerson*, (c) this is very distinctly stated and recognized as the practice of the Court; and in *Stroud v. Deacon*, (d) where the bill charged that a deed, which was the defendant's title, contained evidence which would defeat it, the defendant was compelled to answer. Now it is also perfectly clear that, if the defendant pleads a deed which constitutes his title, he cannot be compelled to produce it, because it is his own title and not that of the plaintiff; but if the plaintiff alleges that that deed contains something which would show or support his the plaintiff's title, the defendant is bound to answer an interrogatory founded on that allegation, because, although the deed is the defendant's title, it may be the most important part of the evidence of the plaintiff, who may find in it a recognition of that which, if true, would supersede the title set up by the instrument itself.² In the case to which I have referred, *Stroud v. Deacon*, (d) * that point was distinctly raised; but there * 261 are several other cases where it has also arisen. There is

(a) 16 Ves. 262.

(c) 8 Bli. N. S. 62.

(b) 2 V. & B. 361.

(d) 1 Ves. 37.

¹ *Ante*, 247, n. (1).

² If a plaintiff is entitled to a discovery of deeds or other documents for the purpose of establishing his own case, his right to such discovery will not be affected by the circumstance that the same documents are evidence of the defendant's case also. 1 Dan. Ch. Pr. (4th Am. ed.) 580; *Burrell v. Nicholson*, 1 M. & K. 680; *Wigram on Disc.* 244; *Smith v. The Duke of Beaufort*, 1 Hare, 507, 518; 1 Phil. 209, 218; 7 Jur. 1095; *Combe v. Corporation of London*, 1 Y. & C. C. C. 631, 650; *Earl v. Lloyd*, 3 K. & J. 549.

one in particular ; it was the case of a bill and cross-bill. The suit was instituted for tithes, and the bill alleged that a book which belonged to the defendant contained receipts constituting a recognition of a modus. The Court, on the ground that this would be evidence in support of the plaintiff's case, ordered the defendant to answer the allegation, and subsequently compelled a production of that part of the book which contained the receipts. In short, the general principle of the Court in the cases to which I have referred shows, that, although the defendant will not be compelled to produce a document which is the evidence of his title, yet, if he intend to avail himself of that protection, he is bound to negative that which the bill alleges such a document to contain, so far as it would be evidence of the title of the plaintiff. The reason is, that, whether it be something to be found in the document itself, or to be inferred from the absence of it in the document, the circumstance alleged is alleged, not for the purpose of investigating what the defendant may have to show as proof of his title, but for the purpose of establishing or strengthening the plaintiff's title or of repelling that which he expects to be set up against it, all of which are legitimate points of discovery.

With these preliminary observations, I proceed now to consider what the exceptions in the present case are, what it is that the defendants decline to discover, and what the Master of the Rolls has decided they are bound to discover. I may first observe, that the case relied upon of a party not being bound to produce evidence of his own title has very little application to a case where the

defendant in point of fact has set up no title, but merely

* 262 that which negatives the plaintiff's * title. Great discussion

has sometimes taken place as to the effect of a negative plea ; but it is quite new to hear of a negative answer ; that is, an answer which merely denies the plaintiff's title, and refuses on this ground to afford any discovery. The case, however, must be looked at as it appears on the plaintiff's bill.

Now the first exception is in reference to the interrogatory, " Whether it is not true that no charters or letters-patent given or granted by any of her Majesty's predecessors, kings or queens of this realm, contain any grant of the ground, soil, or bed of the river Thames, or of the shores thereof between high and low water mark, to the mayor, commonalty and citizens, or how do the defendants make out the contrary ? " That is not the whole

of the interrogatory, but I take that branch first. If the plaintiff is right in the general proposition that all beds of all navigable rivers are vested in the Crown, as laid down by Lord HALE, then the defendants can only claim by some grant from the Crown. Now the defendants have not told us how they claim, and, therefore, if they are entitled to go into the case at all upon these pleadings, they may be able to establish their title, and may intend to establish it by producing some charter. But the plaintiff says there is no charter containing any grant of the soil. The question then between the parties being to whom the soil belongs, the plaintiff says that charters have passed from the Crown to the Corporation of London, and that in none of them is there any grant of the soil. He therefore does not ask to see these charters, which may or may not operate for the advantage of the defendants, but it being part of his case, that in all deeds which are provable between him and the defendants, there is no grant of the soil or bed of the river, he has clearly a right to discovery, in order that, * when the matter comes to a hearing, he may * 263 have an admission from the defendants themselves that no charter contains any such grant. This falls distinctly within the principle of the cases to which I have already referred; and it is quite independent of knowing what the defence is, that the plaintiff has a right to a discovery of what those charters do or do not contain, so far as it constitutes his own title. Then comes the other part of the interrogatory, about which I had more doubt than about any other portion of the case. It is in these words: "And that the defendants may discover and set forth under or by what charter or letters-patent or other grant they claim to be entitled to the freehold of the soil." Now that looks like an investigation of the defendants' title, but it is not an investigation of the proof of that title except as to that which constitutes the foundation of it; and that comes exactly within what Lord REDESDALE says, and in which the Vice-Chancellor WIGRAM concurs, that the plaintiff is entitled to a discovery of the case upon which the defendant relies. He is entitled to know what that case is; but Lord REDESDALE goes further, adding, "and how he means to support it." If, by these words, it is intended to say that the plaintiff in the present case might ask to see the charters, and thus to investigate the evidence on which the defendants rely, that

would clearly be going beyond what the rule of the Court would permit, and Lord REDESDALE would have expressed himself too largely; but taking the words in a restricted sense, they simply enable the plaintiff to ask under what title the defendants claim the property which the plaintiff asserts to be still vested in the Crown. Although, therefore, that part of the interrogatory was apparently open to some doubt, yet I think, for the reasons

* 264 I have just stated, that the plaintiff is * clearly entitled to an answer to the whole of the interrogatory embraced in the first exception.

With regard to the other exceptions, they will be found to fall within the same principle as that which I have already observed upon with reference to the first. The second exception is, — (His Lordship here read the second exception). The question refers to charters recognizing or confirming a grant; and, therefore, as to the plaintiff's right to know their contents, this and the first exception stand precisely upon the same footing.

Then the third exception is, — (His Lordship here read the third exception). Now this relates to a matter of fact; namely, whether the charter of Henry 6 is now in operation, or has been revoked. The defendants decline to answer; but if there be such a charter, it is of course necessary for the plaintiff to know whether it is now in force, or has been revoked. It is a fact quite unconnected with the defendant's title, and the exception must accordingly be allowed.

The fourth exception is, — (His Lordship here read the fourth exception). This has immediate reference to the two different positions in which the defendants stand, that of conservators, and that, as they allege, of owners of the soil. Beyond all doubt they are conservators, and certain acts have been done by them; and the question is, whether those acts are referable to their claim of title, or are not to be explained by the control and dominion which, as conservators, they have obtained over the bed and soil of the river.

Now this is no investigation of the defendants' title. The

* 265 question may not be of much benefit to the * plaintiff, as the answer to it is perfectly obvious, for the defendants who set up that they have a title will refer all acts of ownership to that title; but it does not follow that on this account the defendants are entitled to refuse to answer it. It is not to be answered

by the corporation only under their seal, but the officer of the corporation is made a party to the information.¹ He may, therefore, when he comes to answer this question, have to consider whether he can safely say that the acts of ownership alleged are altogether referable to the title set up, or whether they may not be referred to the power and authority of the corporation as conservators. It is a fact which it may be very important to the plaintiff to know; for if he should get an answer that those acts of ownership are not to be referred to the title, but to the office of conservator, a great step would be made towards establishing his title, and negating that of the defendants. It appears to me, therefore, that this and the foregoing exceptions, except perhaps the latter part of the first, fall clearly within the rule established by the authorities already referred to.

Then comes the last exception, which is a general inquiry as to the possession of documents. Now, in the first place, if the defendants have not set up an adverse title, it is impossible for them to protect themselves by the rule that a defendant is not compellable to make a discovery relative to his title, because that must be founded upon his having set up some title.² I confess that, looking very anxiously through these papers, I am very much inclined to think that there is no title set up, in the sense and meaning of that term as applied to the protection of a defendant from discovery. There must be some legal foundation for his title before a defendant is to be at liberty on that * ground to * 266 protect himself from discovery; I cannot consent to his doing so under an idea of that being his own title, which is merely, in fact, a negation of the plaintiff's title. It is not, however, necessary to come to any decision upon that point, because I think there is quite enough upon the mode in which the interrogatory is answered, to show that the defendants are not entitled to the protection which they seek. Their answer is divided into two parts: the defendants endeavour to answer what they feel they are bound to answer, and to protect themselves against the remainder. They admit that they have in their possession certain deeds, &c., relating to the right and title of the defendants to the freehold of the bed and soil of the river, and the enjoyment thereof, all which several deeds, &c., evidence and show, or tend to evidence and show, such

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 296, 297.

² See 2 Dan. Ch. Pr. (4th Am. ed.) 1672, and cases.

right and title of the defendants, and all which deeds, &c., they are advised and believe form material parts of the evidence possessed by the defendants of their right and title, and all which are intended to be made use of and given in evidence by the defendants in support of their right and title in the cause, and none of which do, as the defendants are advised and believe, evidence or tend to show or prove the pretended and alleged right of the Crown set up in the information, nor would the informant derive any proof in support of his case from the production of such deeds, &c., or any or either of them. Then they say that they have other papers, which they do not seek to protect in the same way. Now in the first place the charge is, that the deeds, &c., "relate to the matters aforesaid," that is, to the matters stated in the information; and the defendants take upon themselves to say that they believe that they do not contain evidence of or tend to show the plaintiff's title. Have the defendants a right to do this?

* 267 * They do not allege that the documents do not "relate to the matters aforesaid;" nor is there any description of what they are, so as to enable the Court to decide this point. If such a proceeding could be permitted, a plaintiff would never get a discovery of any documents, because the defendant might always protect himself by merely pleading his belief that they did not contain evidence tending to prove the plaintiff's case. Now there is a case somewhat similar to the present, *Jerrard v. Saunders*, (a) where a party endeavoured to protect himself from the discovery of certain deeds by a plea of purchase for valuable consideration without notice, and an averment that the party under whom he claimed had not, to his, the defendant's, knowledge and belief, any notice of the title set up by the plaintiff; but the defendant did not answer the facts charged in the bill as affecting him with notice. The Court refused to allow the defendant to be the judge of what was constructive notice, and held that he was bound either distinctly to negative the grounds on which the plaintiff asked for the production of the deeds, or to produce them. Now, if the defendants have not set out a title, which appears to me to be the result of the pleadings in this case, then it is not necessary to resort to more authorities to ascertain whether there ought to be an answer to this last interrogatory or not. But even on the con-

(a) 2 Ves. Jr. 187.

elusion that they have set out a title, they are still not entitled to protect themselves from the discovery of these documents, so as to withhold all information as to what they are, or whether there are any such at all. I think, therefore, that this exception must also be allowed, and that the Master of the Rolls came to a right conclusion.

* I do not follow the whole of the reasoning of the Master * 268 of the Rolls; but, on looking through the pleadings, the grounds on which it strikes my mind that the discovery ought to be made are so very clearly explained in the text-books, and by the authorities, that it is unnecessary to advert to more than what I have already said with respect to the united character of conservancy and claim of title. It is obvious that it is very difficult to reconcile the circumstance of those two things existing together, and that it entitles the plaintiff to a very scrutinizing inquiry for the purpose of separating the acts which may be referred to one, or which may have arisen from the exercise of the other. It is impossible not to observe that, if those two things are united in one and the same body, the interests of the public are not secured. It is the duty of the corporation, as conservators, to prevent obstruction, and to take care that the bed of the river is not applied to any purposes of profit to the prejudice of the public; but as owners of the soil they would, no doubt, have an opportunity of doing that which might be very inconsistent with this duty. The information, however, is not confined to the title arising from ownership of the soil, for it alleges that if the defendants are owners of the soil, and if, therefore, the Crown has not that authority and power which would arise from the general power and title of owner of the soil, then the acts mentioned are neglects or abuses of the power and jurisdiction of the corporation as conservators, and are to be treated as nuisances. That, however, does not touch the matter under consideration upon these exceptions; and upon the grounds before stated, I think that the interrogatories to which the exceptions relate must be answered, and that the appeal from the Master of the Rolls must be dismissed.

* Now with reference to the question of costs. The * 269 Master of the Rolls has dealt with these parties as two ordinary parties, and has given costs accordingly; but it is said that costs are not to be given because there is a rule, or at least a

practice, that the Attorney-General neither receives nor pays costs. Such a rule, however, although it has, no doubt, been recognized by the House of Lords, seems to me to be too vague to be generally acted on.

His Lordship then added that, as it was of considerable importance that the rule in question should be clearly understood, he would take an opportunity of considering the matter further, and of looking into the authorities.

1850. January 14.

THE LORD CHANCELLOR. — This case stood over for the purpose of my making some inquiries as to the course of proceeding with regard to costs where the Attorney-General is a party. I have had an opportunity of looking at a variety of instances which clearly show that, although there may be, and has been, a generally received opinion, a sort of saying, that the Attorney-General neither pays nor receives costs, yet that is open to a variety of exceptions, and that there are very many cases to be found in which that rule has not been acted upon. There does not, however, appear to have been a very general practice or understanding upon the subject.

Two cases in the House of Lords were referred to, and if they establish the rule, no doubt it is binding upon this Court, and it is very clear that there would be no option but to follow the
 * 270 rule so laid down. * But there is always a distinction to be taken, and to be borne in mind, between the order of the House itself, and the reasons given by the member of the House delivering the judgment. In the two cases referred to, namely, this case in a former stage of it, (a) when I was present, and a case from Scotland (b) last session when I was not present, the order of the House seems to have been that there should be no costs. There is not, however, in either case a decision laying down the principle why the order was so framed, or why the House adopted that course. On the other hand, when I look to what the House of Lords has done in other cases, I find that the House of Lords has given the Attorney-General costs. One case in particular has been called to my attention, *The 'Skinners' Company v.*

(a) *The Corporation of London v. The Attorney-General*, 1 H. L. 440.

(b) *Smith v. Earl of Stair and Others*, 6 Bell's App. C. 13 Jur. 713.

The Irish Society, (a) where the Attorney-General was a defendant, and in which the bill having been dismissed at the Rolls with costs, the House of Lords, on appeal, affirmed the whole of that decree.

Now I do not consider myself bound by what passed in the House of Lords in the case at which I was present; namely, this very case upon the demurrer. My recollection of what then took place is, that the question was started as I was addressing the House, giving judgment upon the principal subject-matter, and it was called to my attention that the Attorney-General was a party. The rule was referred to of the Attorney-General neither receiving nor paying costs, and the House acted upon my individual advice, not to give costs in that particular case. That advice was given * without time for consideration: there was no argu- * 271 ment, and I think there was an error in the advice which I then gave to the House of Lords upon the subject. The order merely was, that the decision was affirmed without costs.

It is perfectly true that justice requires that the rule which has been so often acted upon, and so generally received as an axiom, should not be lost sight of, and nothing would be more unjust than in a contest in which the Attorney-General could not be made to pay costs, that he should be, under any circumstances, entitled to receive costs, for it is not putting the parties at all upon equal terms. As far however as regards a party being relieved from any injustice arising from the Attorney-General being opposed to him as a suitor, in a case where if a private individual, the Attorney-General would have been made to pay costs, the Court says to the party that as he cannot receive costs, he shall not pay costs. But that rule ought not to be extended beyond what is reasonable: it ought not to be extended beyond the cases in which the Attorney-General, if he were not Attorney-General, but suing as an individual, or any other individual suing in his place, would be liable to pay costs. The rule, instead of being, that the Attorney-General neither receives nor pays costs, ought rather to be, that where the Attorney-General could be called upon to pay costs (had he been a private individual), then he ought not to receive costs. That would apply to the hearing of the cause, at which it depends entirely upon what passes in the cause, upon what the case is, and

what the opinion of the Court is on the facts disclosed, whether the plaintiff or defendant is to pay costs. Where however one party is in possession of a judgment, and the opposite party

* 272 comes and questions that judgment, * then the matter of costs is not in the discretion of the Court. The party in possession of the judgment never is made to pay costs. He has got the judgment, and is entitled to defend it; and although the Court of Appeal, or the Court upon rehearing, or the Court upon hearing exceptions to the Master's report, which is the same thing, may be of opinion that the judgment pronounced is not right and therefore alters it, the party who merely supports what a Court of competent jurisdiction has already determined, is never made to pay costs in that contest. If the party is dissatisfied with the judgment below, and is trying to get it altered, and fails to do so, he is generally made to pay costs, not necessarily, but generally; but the party holding the judgment below is never made to pay costs. The reason, therefore, of the rule does not apply where there is an appeal against a judgment already pronounced. All that, no doubt, goes to prove what I admit was an error in the view which I took of this case at the time it was before the House of Lords upon the demurrer. The party questioning the decision of the Court below having failed, I do not think that the principle of the rule applied or that it ought to have been applied to that case. Here precisely the same thing occurs. The Master expresses an opinion, and the party against whom that opinion is expressed complains of it; the Master of the Rolls however is of opinion that there is no ground for that complaint, and therefore gives the costs of upholding the judgment. This is a case in which the Attorney-General could not have been made to pay costs, and thus the position of the parties here is exactly the same; and therefore the position of the Attorney-General as to costs is no grievance against the opposite party upon appeal.

* 273 * I have consulted with the best authorities upon the subject, and we are all of opinion that it would be well to consider, not as a rule without exception (because it is always matter of discussion to a certain extent), but as a general rule, that the principle that the Attorney-General never receives nor pays costs, may be modified in this way; namely, that the Attorney-General never receives costs in a contest in which he could have been called upon to pay them had he been a private indi-

vidual. That would give all the protection to the suitor opposed to the Attorney-General which is in justice due to him, and at the same time discourage what I think is too often the case; namely, carrying on an unnecessary and improper litigation in consequence of that rule.

I am, therefore, of opinion upon these grounds, that the Master of the Rolls was right, and that the appeal must be dismissed generally, including the question of costs.

• M'LURE v. RIPLEY.

• 274

1850. January 24, 25, 26, 29. Before the Lord Chancellor Lord COTTENHAM.

A. and B. entered into a joint adventure for the purchase of goods to be shipped to China, to be there sold, and the proceeds of the sale invested in a homeward cargo. A. was to render himself liable for the payment of the goods purchased, and B. was to supply A. with a share of the money by a fixed time, so as to enable A. to meet this liability. At the time fixed A. applied to B. for the money, but B. failed to supply it. In consequence of this, and after some negotiation on the subject, A. offered to allow B. to withdraw from the adventure altogether, and this offer was ultimately accepted. Down to the time when A. applied to B. for the money, A. had communicated to B. all the information which he possessed relative to the adventure and to its chances of success, which then appeared very doubtful; but while the negotiation was going on A. received two letters from his correspondents in China, through whom the business was managed, the contents of which he did not communicate to B. *Held*, in a suit impeaching the arrangement by which B. gave up his share of the adventure, that, considering the relative situation of the parties, there was no obligation on the part of A. to communicate to B. the letters in question; and that, there being no proof of misrepresentation by A., the arrangement could not be set aside merely on the ground of the non-communication of the letters.¹

Effect of delay on the part of a plaintiff in equity, seeking to stay a proceeding at law [p. *276].

THIS was an appeal by the defendant from the decision of the Vice-Chancellor of England, refusing, on the motion of the defendant, to make absolute the order *nisi* for dissolving the

¹ See 1 Lindley Partn. (Eng. ed. 1860) 493; 2 *id.* 764, 792; Reilly v. Walsh, 11 Irish Eq. 22.

common injunction which had been obtained by the plaintiff in the cause.

The following brief outline of the facts of the case, and of the arguments of counsel, will sufficiently explain the judgment of the Lord Chancellor, in reference to those points as to which it has appeared advisable to report it.

The plaintiff, M'Lure, was a merchant at Belfast; the defendant, Ripley, was a merchant at Liverpool, having correspondents, Messrs. Ripley & Co., at Shanghae, in China. On the 20th June, 1846, an agreement was entered into between the plaintiff and the defendant, for the joint purchase of certain goods to be shipped from Liverpool to Shanghae, to be disposed of there, and the proceeds of the sale to be invested in tea. The plaintiff and * 275 defendant were to * be jointly interested in the goods purchased, and also in the proceeds of the homeward cargo of tea. The money to pay for the goods purchased was to be supplied jointly; the defendant, however, actually paying for the goods by means of bills, to become due in the months of March and May, 1847, and the plaintiff providing him with his share of the money, to enable him to meet the bills as they so became due.

In pursuance of this agreement, the defendant purchased goods, and took the necessary steps for carrying out the adventure, in doing which many letters passed between him and his correspondents Messrs. Ripley & Co., to whom the goods were consigned, and through whom the sale of the goods and purchase of the homeward cargo were to be managed. This correspondence clearly showed that there was considerable uncertainty as to the success of the adventure. On the 7th October, 1846, the defendant wrote to the plaintiff, informing him that his proportion of the cost of the goods purchased would have to be paid, as the bills would fall due in the months of March and May, 1847. Shortly before the month of March, 1847, the defendant applied to the plaintiff to supply him with his share of funds needful for meeting the bills then coming due. The plaintiff not being prepared to supply the funds required, the defendant ultimately gave him the option of withdrawing from the adventure altogether. This offer was accepted; and on the 6th March, 1847, the plaintiff formally resigned all share in the adventure.

It clearly appeared that, down to the time of the defendant's

application to the plaintiff for his share of the money required to meet the bills, all the correspondence which had passed between the defendant and Messrs. Ripley & Co., had been communicated to * and was known by the plaintiff; but that, * 276 subsequently to that application, two letters had been received by the defendant, dated the 19th and 22d December, 1846, which were not communicated to the plaintiff.

Soon after the plaintiff had surrendered his share in the adventure, and on the 16th March, 1847, a new contract was entered into between the plaintiff and defendant for the purchase by the plaintiff of certain parts of the cargo then coming home in the course of carrying out the adventure, in which the defendant was then solely interested. The cargo having subsequently arrived, and the plaintiff having failed in performing his contract of purchase, the defendant, on the 9th January, 1848, commenced an action against him for damages.

On the 24th February, 1848, the plaintiff instituted the present suit to set aside the contract of the 16th March, 1847, as fraudulent and void, and to restrain the prosecution of the action. The plaintiff having obtained the common injunction for want of answer, subsequently moved before the Vice-Chancellor of England to extend it to stay trial. This motion was granted by his Honor, but, on the 16th March, 1849, the Lord Chancellor, who considered the case as falling entirely within the principle of *Thorpe v. Hughes*, (a) discharged the order. (b)

* In consequence of this decision, the action was tried, * 277 and a large amount of damages recovered by the defendant in equity. One of the grounds of defence in the action was fraud

(a) 3 M. & C. 742.

(b) In reference to this proceeding the Lord Chancellor, in that part of his judgment which has been omitted from the report, made the following observations: "A question arose as to whether the plaintiff in equity could, under the circumstances, extend the order to stay trial till the answer was put in. The Vice-Chancellor thought that the plaintiff was so entitled; but on the case coming before me I thought differently, on account of the very great delay which had taken place. The Court expects great promptitude where a party applies to stay a trial at law; and, in my opinion, there was ample evidence of the want of such promptitude. I accordingly held that the plaintiff had by his conduct deprived himself of the benefit (if any) which he might otherwise have derived from the delay which had taken place in trying the action."¹

¹ See *South Eastern Railway Co. v. Brogden*, 3 M.N. & G. 8, 27.

in getting rid of the original contract, the argument being that, if the first contract had not been thus got rid of, the second would not have been entered into. The verdict of the jury, and the judgment of the Court of Exchequer on a motion for a new trial, however, distinctly negatived the case of fraud thus sought to be established.

The defendant Ripley, who had put in his answer, then proceeded to get rid of the injunction, which restrained him from receiving the damages recovered by him at law, and the case came again before the Vice-Chancellor of England, on a motion to make absolute the order *nisi*, discharging the injunction. His Honor, however, refused to make the order, on the ground that the defendant was bound to have communicated to the plaintiff the two letters before mentioned, and that the fact of his not having done so was itself quite sufficient to raise a *prima facie* case of suspicion, making it the duty of the Court to continue the injunction.

From this decision the defendant Ripley appealed to the Lord Chancellor.

Mr. Malins and *Mr. Renshaw*, for the defendant, submitted that, upon the hesitation of the plaintiff to * perform his part of the contract, the defendant's obligation ceased to communicate to him all the information received.

Mr. Bethell, *Mr. Rolt*, and *Mr. Eddis*, in support of the decision of the Vice-Chancellor, did not rely on the simple fact of the non-communication of the letters in question, as to which there was no dispute, but endeavoured to show that the letters contained information which, under the circumstances of the case, it was material should have been made known to the plaintiff; that, in fact, the letters tended to prove that the adventure was likely to be a prosperous one, whereas the defendant represented it as likely to end in a loss. They also contended that the plaintiff had been induced to abandon the first adventure by misrepresentation, of which they specified various particulars, and that, as the second contract would not have existed unless the first had been terminated, it was the duty of the Court to discharge the plaintiff from all liability or responsibility arising out of the second contract, or, in other words, to set aside that contract for fraud.

Mr. Malins, in reply.

January 29.

THE LORD CHANCELLOR.—This is a case of some complexity, owing to the multitude of letters which passed between the parties, and which are relied on as containing the merits of the case. I have very carefully examined them, and it is only by so doing that any safe conclusion can be come to as to the points raised by the pleadings.

* His Lordship here went through the history of the * 279 transaction; and, after referring to the judgment of the Vice-Chancellor, which gave rise to the present appeal, proceeded as follows:—

His Honor appears to have treated the mere fact of the non-communication of the two letters of the 19th and 22d December, 1846, without the least reference to the materiality of the information withheld, as the groundwork for his order for the injunction; but a totally different view of the case was taken by the learned counsel who endeavoured to support the injunction before me. They most properly, as it appears to me, thought it was necessary to show that the information withheld related to matters material for Mr. M'Lure to have been apprised of before he was called on to give an answer to the proposal made to him by Mr. Ripley. In this reasoning I entirely concur, because when the relative situation of the parties is for a moment considered, I do not think the opinion thrown out by the Vice-Chancellor at all falls in with the facts of the case. Only consider for a moment what was the relative situation of these two parties. They had engaged for a partnership, and had agreed to be jointly interested in the adventure, and were, therefore, mutually entitled to all the information connected with it. But then, in order to entitle either party to the benefit of this joint interest, he was bound to perform his part of the contract; and the moment, therefore, that Mr. M'Lure declined to advance, or that he did not advance, the money when Mr. Ripley had a right to expect it from him, he ceased any longer to have the rights of a partner. He had no longer any right to inquire into the history of the adventure, if he refused to produce the money which, according to his agreement, he was bound to contribute.

* Then it is said there was some misrepresentation by the * 280 defendant about the manner in which the goods were to be paid for; but it is quite clear from the correspondence that no such misrepresentation existed.

Thus, then, Mr. Ripley had a clear right to say to Mr. M'Lure,

"You agreed to this joint adventure; perform your part of the contract, and you shall then have all the information that, as a joint adventurer, you are entitled to; but you are no longer entitled to the benefit of a joint adventurer if you refuse to perform that which, as a joint adventurer, you are bound to perform." There was, therefore, no obligation at that time binding Mr. Ripley; and Mr. M'Lure, under the circumstances in which he had placed himself, had no right to say, "Give me all your information, and I will decide whether I will be a partner or not." Suppose the information had been such as to induce Mr. M'Lure to believe (and such was in fact the information received) that the speculation was not likely to be a profitable one, — was the payment of these goods by Mr. M'Lure to depend on whether he formed a favourable or unfavourable opinion of the adventure? He was a partner for better or for worse: if there was a loss, he was bound to bear his proportion of it; if there was a profit, he was entitled to his portion of that profit. He could not withhold the money and say, "I will not pay the money until I know how the adventure turns out."

However the case does not rest there, for it appears clearly from the correspondence that Mr. M'Lure was informed of every thing that Mr. Ripley knew, or could know, from the communications he had from China, of the probable results of this adventure. I am

only adverting to this for the purpose of trying the ground
 * 281 * on which the Vice-Chancellor's order is formed; namely, that the mere fact of not communicating those two letters at the time, is ground sufficient to make it the duty of the Court to continue the injunction. However, the material fact, not only as it affects the ultimate merits, but as it affects my opinion of the conduct of the parties, depends on what actually took place between them, coupled with what information they had received from China, and how far Mr. M'Lure was made acquainted with the real circumstances of the case.

Before I refer to the letters on which that part of the case depends, I must observe on the great singularity of the form in which this matter comes in question. After the first contract had been terminated at Mr. M'Lure's option and by his act on the 6th March, 1847, ten days elapsed, and then an entirely new contract was made between the parties, which it is obvious would not have been made if the other contract had continued in force, by which Mr. M'Lure was to be a purchaser of, instead of a joint adventurer

in, the homeward cargo. Now, the injunction is against recovering damages which the jury had awarded for the non-performance of the second contract, but it leaves the first contract untouched, and indeed the bill takes no notice of the first contract, except as a narrative leading to the second. What, then, would be the result, if the bill was to attain its object, and if the second contract was to be set aside for fraud? The parties would be then restored to the situation they were in before the second contract was entered into; and the first contract would be revived, which, however, is not the object of the bill; nor does the bill contemplate the position in which the parties would be if the plaintiff obtained the decree he prays. This is a most inconvenient *state of pleading, even if allowable, because it opens the *282 door to future litigation. And how is Mr. Ripley to know in what position he stands, if the second contract is set aside, and the parties left to their rights on the first? The effect of setting aside this second contract is to undo that which was in fact the closing of the first, supposing it was all one transaction. It was not, however, one transaction, nor does it follow that the one contract was substituted for the other. The first was disposed of by mutual consent on the 6th March, 1847, and then it terminated; and if no further connection had been formed between the parties, neither party could have had any claim against the other growing out of that transaction. On the 16th March, however, Mr. M'Lure enters into an entirely new contract with Mr. Ripley relative to the first adventure, that is, relative to the homeward cargo, and therefore a contract that could not stand with the first. Thus the second contract might, from some vice inherent in it, be set aside, or be incapable of being carried into execution, but it would not in the least affect the first; so that this suit, so far from deciding the rights of the parties, might only revive them in a much more difficult form and shape than that in which they had hitherto existed.

With respect, however, to the injunction (depending as it does on what took place on the cancellation of the first contract), it is important to consider how the case is made out. Now the case, so far from being made out, or attempted to be made out, on the ground on which the Vice-Chancellor continued the injunction, was very distinctly and clearly put by the plaintiff's counsel upon the ground of misrepresentation. It was said that there was such misrepresentation by Mr. Ripley to Mr. M'Lure as induced

* 283 the latter to abandon * the first adventure, that the second contract could not have existed unless the first had been set aside, and that a Court of Equity would therefore discharge Mr. M'Lure from all liability or responsibility as to the second contract; that is to say, would set aside the second contract for fraud. This is in fact the only point in issue between the parties in this suit.

The Lord Chancellor here referred to the various points of alleged misrepresentation, observing, that if it could be proved that a fact was represented by Mr. Ripley to Mr. M'Lure contrary to the knowledge he, Ripley, had as to the state of the adventure then in progress, such a circumstance would, beyond doubt, affect the contract entered into between them. His Lordship then proceeded to refer to those passages in the letters, including the two letters of the 19th and 22d December, 1846, and to the representations made, which proved (as his Lordship stated) to his satisfaction that there was no misrepresentation at all, but that, on the contrary, the plaintiff had full information of every thing material for him to know, in order to enable him to come to the conclusion as to whether he should avail himself of the defendant's offer of withdrawing from the adventure. His Lordship then concluded as follows:—

I have most carefully looked through the letters in question, not only on account of the important interests involved in this case, as far as money is concerned, but of the interest involved in it as far as character is concerned; and I entirely dissent from the opinion of the Vice-Chancellor, that it was quite immaterial what these letters contained, and that the mere fact of their not being communicated was quite sufficient to call upon this Court to interfere. I can hardly imagine how non-communication, with-

* 284 out misrepresentation, of a document, * which document is entirely immaterial to the subject-matter of the suit, can be a ground on which an injunction can be supported. I think it turns entirely on what the communication was, and how far the alleged misrepresentations are made out in point of fact. I am quite satisfied that not only was there no wilful misrepresentation, but that nothing passed from Mr. Ripley to Mr. M'Lure to lead him to a conclusion otherwise than perfectly consistent with the information which Mr. Ripley had received. I also think the relative situation of the parties did not entitle Mr. M'Lure, as a

partner, to have communicated to him any thing about the joint adventure until he made himself a party to the joint adventure by paying the money. With the information which Mr. Ripley had communicated to him, and as far as he could judge for himself, he thought it more to his advantage to decline having any thing to do with the joint adventure according to the first contract, in preference to paying down the money and taking his share of profit and loss. It was entirely at his option to do so. He elected to do so, and there being no misrepresentation to induce him to come to that conclusion, I think he is bound by the election he made, and that the second contract is not therefore subject to any infirmity arising from any connection with the transaction, which was terminated on the 6th of March.

Being of opinion that there is no case shown against dissolving the injunction, the order *nisi* must be made absolute.

*The GRAND JUNCTION Canal Company v. DIMES.¹ * 285

1850. February 4, 6. Before The Lord Chancellor Lord COTTENHAM and the Master of the Rolls.

In a suit in which an incorporated company were plaintiffs, a decree was pronounced by the Vice-Chancellor of England in favour of the plaintiffs and was affirmed on appeal by the Lord Chancellor. The defendant having afterwards discovered that the Lord Chancellor was a shareholder in the company, moved to discharge his Lordship's order, on the ground that his interest in the matter rendered the order void. The Master of the Rolls having, at the request of the Lord Chancellor, heard this motion, was of opinion that it ought to be refused with costs.² The defendant having subsequently been committed for the breach of an injunction granted in the suit and made perpetual by the decree, moved to set aside the order for his committal, and at the same time renewed his former motion, seeking also to stay all proceedings in the suit and to take the bill off the file. The Master of the Rolls, who on this occasion sat with the Lord Chancellor, adhered to his former opinion, holding also that there was nothing, in the circumstance that the objection of

¹ S. C., 2 H. & T. 92; 3 H. L. Cas. 759; S. P. 3 H. L. 794.

² When this case came before the House of Lords, it was there held, that the Lord Chancellor is disqualified, on the ground of interest, from sitting as judge in a cause, and that his decree was voidable, and must consequently be reversed. *Dimes v. Grand Junction Canal*, 3 H. L. 759. See *Egerton v. Brownlow*, 4 H. L. 32, 240; *Ranger v. The Great Western Railway Co.*, 5 H. L. 73, 82, 88, 113.

interest did not appear on the record or otherwise in the case, which prevented the defendant from bringing the decree or any order made in the suit by the Lord Chancellor by appeal before the House of Lords, or from obtaining a second rehearing of the same before the Lord Chancellor.

The Lord Chancellor concurring in the opinion of the Master of the Rolls, the application was dismissed with costs.

The signing of an order or decree of a subordinate Judge by the Lord Chancellor makes it in point of form the order or decree of the Lord Chancellor.¹

THIS cause, in which the company of proprietors of the Grand Junction Canal were plaintiffs, and William Dimes was the principal defendant, was heard by the Vice-Chancellor of England in November, 1846, when his Honor made a decree in favour of the plaintiffs, making perpetual an injunction which he had previously granted, and which had been sustained on appeal by the Lord Chancellor (Lord COTTENHAM), restraining the defendant, W. Dimes, from interfering with the plaintiffs' canal.

This decree was affirmed on appeal by the Lord Chancellor (Lord COTTENHAM) on the 27th January, 1848.

W. Dimes having subsequently, and while preparing to
* 286 appeal to the House of Lords, discovered that Lord * COTTENHAM held ninety-two shares in the company, moved before the Lord Chancellor on the 24th February, 1849, on the ground of his Lordship being interested, to set aside the order made on the appeal. (a)

The Lord Chancellor having requested the Master of the Rolls to hear this motion and to consider what order ought to be made upon it, the matter was fully argued before the Master of the Rolls in May, 1849, when his Lordship stated that he should advise the Lord Chancellor that the application ought to be dismissed with costs. (b)

The defendant, W. Dimes, then commenced an action of trespass against the company, who thereupon moved to commit him for a breach of the injunction. The defendant met this applica-

(a) It appeared that Lord COTTENHAM was the holder of seventeen shares in the company in his own right, and of seventy-five shares in a representative character, having also a beneficial interest in some of the latter shares.

(b) 12 Beav. 63. And see for a general history of the case, 9 Q. B. 469, and for the decision of the Vice-Chancellor on the hearing, 15 Sim. 402.

¹ 2 Dan. Ch. Pr. (4th Am. ed.) 1023. In *Dimes v. Grand Junction Canal Co.*, on appeal to the House of Lords, it was held that although the Lord Chancellor, from interest, is unable to hear the cause, he may enroll the decree. 3 H. L. 759; 17 Jur. 73.

tion by a cross-motion to take the plaintiffs' bill off the file for irregularity, but the Vice-Chancellor of England, on the 2d June, 1849, refused to make any order on either motion.

W. Dimes next proceeded to impede the navigation of the Grand Junction Canal, by placing a chain across it; and the plaintiffs moved again on this new ground to commit him for a breach of the injunction. The Vice-Chancellor, on the 10th December, 1849, made an order accordingly.

Under this order W. Dimes was arrested, and committed to the Queen's Prison. On a *habeas corpus* * being granted * 287 on his application to the Queen's Bench, a return was made setting out the order of the Vice-Chancellor, in the margin of which the letters "C. C." appeared. The Court thereupon held that no ground was shown for his discharge, the order of committal being that of the Vice-Chancellor, and no question as to the jurisdiction of the Vice-Chancellor being raised.

W. Dimes now moved that the order of the 10th December, 1849, might be discharged, that the motion of the 24th February, 1849, might be disposed of and an order made in conformity thereto, or that the order of the Vice-Chancellor refusing the defendant's motion of the 2d June, 1849, might be discharged, and the plaintiffs' bill taken off the file with costs, and all further proceedings stayed.

THE LORD CHANCELLOR having requested the assistance of the Master of the Rolls, the motion now came on before their Lordships accordingly. (a)

Mr. W. T. S. Daniel and *Mr. Smythies*, in support of the motion, repeated in substance the same arguments as those addressed by them to the Master of the Rolls, a report of which will be found in the 12th volume of *Mr. Beavan's Reports*, page 65; and they also referred to and commented on the judgment then given by the Master of the Rolls. The substance of their argument on the main point of the case was, that an undis-

(a) When the case was opened it appeared that no order had been drawn up in conformity with the decision of the Master of the Rolls, on the motion of the 24th February, 1849; but the Lord Chancellor at once directed an order to be drawn up accordingly, suspending so much of the order as could interfere with the present application.

* 288 closed pecuniary interest in the subject-matter of * any *lis pendens* creates an absolute incapacity in the party interested to hear and determine any question *in istâ lite*; and that if a person so interested does adjudicate, such adjudication is *coram non judice* as to the person against whom it is made, and that any order or judicial act done by the interested party *in invitum* is void.

Mr. Stuart, Mr. J. Parker, Mr. Busk, Mr. Randell, and Mr. G. L. Russell, appeared for other parties, but were not called on.

The following cases and authorities were referred to and commented on in reference to the consequence of a judge being interested in a matter in litigation before him: *Earl of Derby's Case*; (a) *The Chancellor of Oxford's Case*; (b) *Great Charte v. Kennington*; (c) *Anonymous*; (d) *Brookes v. Earl of Rivers*; (e) *The King v. The Inhabitants of Yarpole*; (g) *The Queen v. The Commissioners for Paving, &c., the Town of Cheltenham*; (h) *The Queen v. The Justices of Hertfordshire*; (i) *Rolle's Ab. Tit. Judges, A. pl. 11*; and by way of illustrating the same point, and as to the consequences of any act done by an interested judge, *Esdaile v. Lund*; (k) *The Queen v. The Inhabitants of Upton St. Leonard's*; (l) *Lord Mostyn v. Spencer*; (m) *Rothschild v. Brookman*; (n) *Drewry v. Thacker*; (o) *Ex parte Baddeley*; (p) *Carus Wilson's Case*; (q) and the Act 8 Vict. c. 18, § 39.

* 289 * On the point whether the objection of interest not appearing on the record could be raised on an appeal to the House of Lords, the case of *Bridgman v. Holt* (r) was referred to.

THE MASTER OF THE ROLLS. — It would certainly have been a very great satisfaction to me if I had heard any thing in the course of this long argument which could induce me to think that Mr. Dimes was, at this time, entitled to any relief. A satisfactory

(a) 12 Rep. 114.

(b) 3 Blackst. Com. p. 299 n.; S. C., Year-Book, M. 8 Hen. 6, 20.

(c) 2 Str. 1173.

(l) 10 Q. B. 827.

(d) 1 Salk. 396.

(m) 6 Beav. 135.

(e) Hardres, 503.

(n) 5 Bli. N. S. 165.

(g) 4 T. R. 71.

(o) 3 Swanst. 529.

(h) 1 Q. B. 467.

(p) 5 Railway Cases, 542.

(i) 6 Q. B. 753.

(q) 7 Q. B. 984.

(k) 12 M. & W. 734.

(r) Show. P. C. 111.

thing it cannot be to any judge to have the notion that, under an order which he has made or which he sanctions, a party is imprisoned and thinks himself to be imprisoned unlawfully. I confess, however, that I have heard nothing which tends, in any degree, to vary the conclusion to which I came upon the motion that was made before me at the Rolls; or to induce me to think that the altered relief, which is prayed for by this notice of motion, ought to be granted.

Mr. Dimes is in prison, under an order made by the Vice-Chancellor of England followed by the signature of the Lord Chancellor and by the warrant of apprehension which was signed by the Lord Chancellor, for the breach of an injunction, granted on the 6th July, 1839, restraining him from interfering with the navigation of the Grand Junction Canal. That he has interfered, and interfered in direct violation of the order and of the injunction, is so far from being denied, or from being attempted to be excused, that it is sought to be justified on the ground, that the order and the injunction founded upon the order were both of them illegal, and such as he is under no obligation to obey. If he had come here stating, as I have understood * he alleges to be the * 290 fact, that his object in committing that act of disobedience was in order that he might obtain the opinion of a Court of Law upon the legality of the proceedings here, and that he had made the attempt to get that opinion, and failed in procuring it, if he had done that, and then suggested that for the disobedience to this Court he had suffered sufficient punishment, I should have felt most strongly inclined to give my humble opinion to the Lord Chancellor that he might be released, not thinking that it would be right, or in any degree necessary, in order to maintain the authority of this Court, that an imprisonment suffered under such circumstances should be unnecessarily prolonged. That, however, is not the course which he has adopted; he comes here, avowing and justifying, and apparently continuing and intending to continue, the disobedience. If I had the authority to state or to think otherwise, it would give me very great satisfaction to do so.

The question then comes simply to this, whether the proceedings have, under the circumstances, been legal or illegal, and upon this I have heard nothing which in any degree tends to alter the opinion that I expressed at the Rolls. The inconvenience which may arise from the necessity of the Lord Chancellor interfering in

some cases cannot be very easily doubted ; but I reject, as altogether unwarranted, the notion that I have ever said that the Lord Chancellor had in such cases any discretion other than that which is accompanied by all the responsibilities which affect a judge. Seeing, therefore, no reason to alter my former opinion, I must take the liberty of again advising his Lordship to make the order pursuant to the recommendation which I then submitted

to him, and for the same reasons which were then offered,
 * 291 and which have been *without the least impropriety discussed by the counsel for Mr. Dimes. I was surprised when it was said that I had admitted that there were circumstances under which the Lord Chancellor was incapable to make an order, for I never said any thing which would justify that statement. I adhere to the opinion which I formerly gave, and I do not know that there is any occasion for me to repeat, or to vary, the language in which I then expressed it. I only desire that that judgment may be construed according to the ordinary meaning of the terms used ; and for the reasons there stated, which I see no occasion to alter, I now take the liberty of recommending to his Lordship to make the order which I then recommended.

There is another point in the argument which I do not wish to pass over, and which was not at all before me at the Rolls ; namely, that this bill should be taken off the file. Now I do not think that it would be proper to make an order for that purpose. Why should the bill be taken off the file ? The reason alleged at the bar is, because the bill was not addressed to her Majesty in her Court of Chancery, but I have not heard any authority or reason sufficient to induce me on this ground to recommend that the course proposed should be taken. A great part of this case seems to have been argued as if Mr. Dimes had no means of getting justice, a proposition very difficult to maintain when it comes simply to this, whether he is to obtain a rehearing in the Court of Chancery, or to submit to the decree, such as it is. Another argument was used, drawn I think from the form of proceedings in Courts of Law, that as the objection taken does not appear on the record, it is not an objection which can be brought before a

Court of Appeal. I consider however that there is a mis-
 * 292 take in likening the proceedings in the * Court of Chancery to the proceedings in a Court of Law. I do not exactly know whether the result of the case cited of *Bridgman v.*

Holt (a) very clearly appears; but however that may be, that case does not apply to the present, and for this reason, that there is not the least doubt that Mr. Dimes has a perfect right to appeal from the decree, and any orders made in this Court, to the House of Lords. To enable him to do that, nothing is wanting but the enrolment, which enrolment I take the liberty of saying I think it would be the duty of the Lord Chancellor to warrant, in order that Mr. Dimes might appeal, either from the Vice-Chancellor's decree or from the decree of the Lord Chancellor affirming that of the Vice-Chancellor, and dismissing the petition of rehearing. The same observation applies equally to the order to be made now. Every order which is made on petition or motion or in any other mode in which this Court can interfere, is subject to an appeal to the House of Lords; and therefore, if the order which is now to be made by his Lordship should be an order of which Mr. Dimes has reason to complain, he has nothing to do but to procure the enrolment of the order, and he may then carry the question raised on this occasion, as well as the questions raised on the merits of the case, to the House of Lords; and on this appeal he will have the advantage of every objection which can be taken on the merits of the cause, or for want of technicality in the form of the proceedings. It is, therefore, the grossest mistake to suppose that Mr. Dimes has no remedy if it is not given in the way which he asks. All that passes here, and every order that is made here, must be subject, of course, to appeal; and if Mr. Dimes is in any way aggrieved by the orders which are made, he can have redress in the * highest tribunal the country affords, and perfectly free from any such objection as is raised on the present occasion. * 293

One other observation I wish to make on the course which Mr. Dimes has adopted. In the Court of Chancery a decree of one of the subordinate Judges once reheard by the Lord Chancellor usually finishes there. If, however, it is enrolled, the matter must go to the House of Lords; but it is by no means without example that a decree made on a rehearing by the Lord Chancellor is, if the circumstances of the case require it, heard over again. There are instances of rehearings of decrees made upon a rehearing; and if the special circumstances of this case should require it, that might

be done here. It was on this account that on the former occasion I more than once asked whether Mr. Dimes wished this course to be taken. He apparently did not; the question was not brought forward in that form, the application in fact being that the case should be restored to the paper of the Lord Chancellor, subject of course to all the objections which have been raised against any proceeding whatever being taken in it by the Lord Chancellor.

Being unable then to see any reason for altering the opinion which I formerly gave, and thinking there is no ground for the application to take the bill off the file; being fully persuaded also that Mr. Dimes is not in the least degree without redress if he is suffering any grievance, but that the merits of the case, as well as the propriety or impropriety of the order now to be made may be brought under the consideration of the House of Lords, on an appeal properly framed for the purpose; and thinking that Mr.

Dimes has not applied under circumstances under which
 * 294 even a rehearing * could be granted; on all these grounds,

I think I am bound to give my humble advice that this motion be refused, and refused with costs.

THE LORD CHANCELLOR. — I am much indebted to the Master of the Rolls for the assistance which he has afforded me in hearing this application, and it is not my intention to enter at all into the subject which has been discussed, or to make any observations on the conclusion to which his Lordship has come. Having asked for his assistance, because my own jurisdiction, or at least the propriety of my entertaining any judicial function upon the subject of this suit, was disputed, I should be undoing the act which I thought proper to adopt of requiring his assistance, if I should at all interfere with, or hesitate to adopt, the advice which the Master of the Rolls has tendered to me. I have, however, the satisfaction of feeling that the opinion he has expressed is precisely the same as I should myself have entertained, if I had taken on myself to deliver judgment without his assistance.

I should not have said one word on the present application, if it had not been for certain statements made by the learned counsel for Mr. Dimes, to the effect that I had advised the application to be made that was ultimately heard before the Master of the Rolls, and that, therefore, it was very inconsistent that I should give effect

to the advice tendered by the Master of the Rolls, that the motion should be refused with costs; and further, that the circumstance of my being a holder of shares in the Grand Junction Canal had led to improper communication with the parties, not by myself personally (that I think was acquiesced in as a fact), but by my principal secretary.

* His Lordship here explained what had really occurred, * 295 showing that both the statements referred to were equally unfounded in fact; that no communications had taken place in consequence of the position in which his Lordship was placed as a holder of shares, nor any other communications, except only that Mr. Dimes himself had on his own application communicated with one of his Lordship's officers, in order if possible to set himself right on a point of form, in reference to a petition of right presented by Mr. Dimes, and in which he, Mr. Dimes, had made a mistake. His Lordship then proceeded as follows:—

Having however said thus much, and without at all interfering with the view which the Master of the Rolls has taken of the merits of the case, or entering into them, I will only state that difficulties may exist, and no doubt do exist where there is an interest, arising from the jurisdiction I am called on to exercise, and from my having the sole power of exercising that jurisdiction. If the Chancellor is a party to a suit there is no difficulty, because the law has provided for it; but if there be merely an interest, in consequence of having which he would be anxious to avoid the duty of adjudicating, on the slightest suggestion by either party that his judgment would be influenced by having that interest, a difficulty does arise from the position in which the Chancellor is placed. I think, however, that that would be as nothing compared with the remedy suggested; namely, that when the fact is known, the Chancellor may exercise his jurisdiction if one party asks him to do so, but cannot do it at the instance of the other party. I will put for example the present case. The cause goes on in its regular course, and is heard by the Vice-Chancellor of England, who makes a decree. The party opposed to the company then discovers that the * Lord Chancellor, who at that time may * 296 have heard nothing whatever of the case, is in some way interested as a shareholder. According to the argument used, if that party is dissatisfied with the decree, the cause is to go on; but if the company is dissatisfied, they have no remedy unless the

opposite party thinks proper to give the jurisdiction. Now that cannot possibly be the state of the law. It must either be that there is no jurisdiction at all, and that the whole matter is void from the beginning; or that, owing to the constitution of the Court, the jurisdiction can only be exercised in the way in which it has been exercised, namely by the Lord Chancellor assuming it: he cannot assume it for one party and refuse to assume it for the other.

In the present case I have the satisfaction of knowing that the position of the property is not in the slightest degree affected by any thing I have done: it stands entirely on the injunction originally granted by the Vice-Chancellor, which remains untouched. When that injunction came before me, I did not think upon the merits it ought to be disturbed; and if I had declined to interfere, as I should have done had I known of Mr. Dimes's objection, the injunction would have still remained. Again at the hearing of the cause, the decree was made by the Vice-Chancellor, and that decree remains. All that I have done in the cause is, to leave the orders of the Vice-Chancellor untouched; so that if the injunction or the decree is wrong, it is not wrong from any miscarriage in point of judgment on my part, but rests entirely upon the orders made by the Court below. With regard to a decree, when it is not enrolled, I do not apprehend the Lord Chancellor signs it, it is merely drawn up, passed, and entered; but if it be enrolled, it becomes my order in point of form. So as to the injunction,

* 297 on the writ issuing * it becomes my order in point of form; but as to any opinion on the merits, or as to any disadvantage which Mr. Dimes may be supposed to have sustained by the decision of the cause, or the granting of the injunction, the case does not rest on any thing I have done, but on the orders of the Vice-Chancellor alone; and the utmost that Mr. Dimes can complain of is, that I have not upon the appeal varied the orders, or the decree which the Vice-Chancellor has pronounced.

That is all I propose to say on the matter, except this, that if that infirmity exists in this Court which has been suggested, some parliamentary enactment must of necessity take place, or otherwise there will be a total failure of justice, or the Lord Chancellor when he accepts the Great Seal must look about him and see what interest he has in any company or association, and must divest himself of every such interest. I do not know how he is to do that, because he may be a holder of stock in the public funds, and most people who are honoured

with the confidence of the Crown are, from their circumstances, likely to be holders of stock. Take the case of the Barons of the Court of Exchequer, whose duty it is to decide on matters of revenue. Suppose one of the Barons is a holder of three per cents, and a question comes before the Court touching the consolidated fund: there is precisely the same sort of interest that I have in the Grand Junction Canal; no doubt it is more minute and remote, and it is not likely that any decision to which the Court may come will affect the dividend. The point is not, however, argued on the question of quantity or degree, but on the abstract principle that any interest in the result of the matter to be decided upon is to incapacitate the Judge and take away his jurisdiction. Now there is no matter that can affect the * general revenue of * 298 the country, which does not or may not to a certain degree affect the consolidated fund. It is an extreme case I admit, but questions of principle are sometimes properly tried by extreme cases. However, I give no opinion upon the point. Fortunately for me, this case has been under the consideration of the Master of the Rolls, and the bar have heard the opinion he has expressed.

The result therefore is, that the order advised by the Master of the Rolls is made an order of the Court, and the present application is refused with costs.

PADBURY v. CLARK.

1850. February 9, 11. June 17. Before the Lord Chancellor Lord COTTENHAM.

J. C. being entitled in fee to undivided moieties of two freehold houses, and also to an undivided moiety in a leasehold house, by his will devised "all that my freehold messuage or tenement, with the garden," &c., referring to one of the houses only. *Held*, that these words were a gift of the entirety of the house referred to, and raised a case of election as against the party entitled to the other moiety and who took beneficially under the will.

The construction of the devise above stated held to be corroborated by the fact of the testator having used apt words in disposing of his interest in the leasehold.

On a question of election by a party bound to elect between two properties, it is necessary to inquire into the circumstances of the property against which the election is supposed to have been made; for if a party so situated not

being called on to elect continues in the receipt of the rents and profits of both properties, such receipt cannot be construed into an election to take the one and reject the other; and, in like manner, if one of the properties does not yield rent to be received, and the party liable to elect deals with it as his own by mortgaging the same, &c. (particularly if this is done with the knowledge and concurrence of the party entitled to call for an election), such dealing will be unavailable to prove an actual election as against the receipt of the rents of the other property.

The liability of a party to be called upon to elect will not be affected by lapse of time so long as his interest in either of the subject-matters of election is reversionary.

UNDER the limitations of the will of James Salkhill, their grandfather, John Cox and his sister Mary Cox Brown were
 * 299 equitably entitled in undivided * moieties to two freehold houses at Tottenham: they were also entitled in moieties to a leasehold house in Park Street, Grosvenor Square. In 1809, Mary Cox Brown died, leaving her husband the defendant Henry Brown and one daughter the defendant Mary Cox the wife of the defendant William Clark. Henry Brown thereupon became equitable tenant by the curtesy of the undivided moiety in the freehold houses.

John Cox, by his will, dated the 20th March, 1812, under which the question of election in this case arose, gave and devised unto Catherine Padbury "all that my freehold messuage or tenement with the garden and all and singular the appurtenances thereunto belonging situate at Tottenham, and now on lease to Mr. Thomas Upton and in his occupation," to hold the same for her separate use for life; and after her death he gave and devised the said messuage or tenement, garden and premises, unto her son Samuel Padbury (the plaintiff), his heirs and assigns for ever. The testator also gave and devised unto William Crook of New Windsor "all that my moiety or half part the whole into two equal parts to be divided of and in all the leasehold messuage or tenement and premises situate and being in Park Street, upon trust that he shall and do from time to time and until the determination of my estate and interest therein receive my portion of the rents and profits, and invest the same as it shall become due and payable in the purchase of 5*l.* per cent Bank annuities in the names of my niece and goddaughter Mary Cox Brown, daughter of my late sister Mary, the late wife of Henry Brown of New Windsor aforesaid; and I direct that the produce thereof together with the interest thereon shall remain invested and be received by my said niece

Mary Cox Brown at her age of twenty-one years or day of marriage which shall first happen * but not sooner." The * 300 testator gave the residue of his personal estate to William Crook, whom he appointed sole executor, but made no disposition of the other freehold house at Tottenham. The testator died in 1812.

The lease of the Park Street house expired in 1819. Mary Cox Clark attained her age of twenty-one in 1831, and soon afterwards mortgaged her interest in the freehold house devised by the will of John Cox. In 1833, she intermarried with the defendant William Clark; and, by the settlement made on her marriage, her interest in the premises in question was assigned to trustees on certain trusts for the benefit of herself and husband and their issue. In the year 1837 the mortgage was transferred to the defendants Robert Pearce and William Crosby M'Nae. Catherine Padbury died in 1830.

The bill, which was filed in 1847 against William Clark and his wife and their children, the surviving trustee of their marriage settlement, and Robert Pearce and W. C. M'Nae, — after charging that the plaintiff had only just discovered that Mary Cox Clark had made her election to take under the will of John Cox, and that under the circumstances she was previously to her marriage a trustee for the plaintiff of the beneficial interest in the freehold house in question after the death of her father, and that William Clark and the trustees of his marriage settlement, the original mortgagees, and the assignees of the mortgage, had notice of the state of the title, — prayed the execution of the trusts of the will of the original testator James Salkhill, and a declaration to the effect that upon Mary Cox Clark attaining twenty-one she was bound to elect whether, as heiress-at-law of Mary Cox Brown her mother, she would take against or under the will of John Cox; and * that she had elected to take under the will of John Cox. * 301 The bill also prayed for a conveyance by all necessary parties of Mary Cox Clark's interest in the freehold house to H. Brown for life, as tenant by the curtesy, with remainder to the plaintiff in fee, and in the alternative, that if Mary Cox Clark had not elected then that she might be decreed to elect.

It was in evidence that after the death of John Cox and during the continuance of the lease of the house in Park Street, and the minority of Mary Cox Clark, W. Crook as executor of John Cox,

and Henry Brown as father and guardian of Mary Cox Clark, received the rents and profits of the moiety of the leasehold house on behalf of Mary Cox Clark; and that on her attaining twenty-one, H. Brown had accounted to her for such receipts, and paid to her a sum of 49*l.* as the balance due to her on the expiration of the lease. It was also in evidence, that in 1833, the plaintiff concurred with H. Brown as tenant by the curtesy and the trustees of the marriage settlement in granting a lease of the freehold house in question, by which lease one entire rent was reserved.

By the decree made on the hearing of the cause before the Vice-Chancellor of England, on the 5th March, 1850, it was declared that Mary Cox Clark was bound to elect, and had elected, to take the leasehold house, and was, therefore, bound to convey the freehold to the plaintiff subject as to a moiety to the life-interest of H. Brown; and the costs of all parties, except H. Brown, were ordered to be paid by the defendants, except H. Brown.

From this declaration the defendants Mr. and Mrs. Clark and their children and the mortgagees now appealed to the Lord Chancellor.

* 302 * *Mr. Malins* and *Mr. Shebbeare* for Mr. and Mrs. Clark and their children, in support of the appeal, contended that the will of J. Cox did not manifest so clear an intention to dispose of property not his own as to raise a case of election: *Dummer v. Pitcher*; (a) that the words used "all that my freehold messuage," &c., would be intended as applying to that estate only in the premises which was the testator's to devise; that in cases arising on the execution of powers, if the words "all my estate" in a will can be satisfied without including the subject of the power, the use of those words would not have the effect of including the subject of the power. *Denn v. Roake*. (b) They further contended, that even if it should be considered that there was a case for election, there was no evidence that Mrs. Clark had elected; that, admitting the obligation to elect, the election itself must be a deliberative act, and with a full cognizance of the party's rights: *Edwards v. Morgan*; (c) that the actual entry on an estate devised was not sufficient evidence of election: *Dillon v. Parker*; (d) that the receipt

(a) 2 M. & K. 262.

(b) 5 B. & C. 720; S. C., 6 Bing. 475.

(c) 13 Price, 782; S. C., M'Cl. 541.

(d) 1 Swanst. 859.

by a widow of an annuity under the will of her husband for five years would not preclude her from insisting on her dower, *Reynard v. Spence*, (a) and that therefore the receipt of 49*l.* by Mrs. Clark soon after she came of age could not operate as an election. They also insisted that the lapse of time precluded the plaintiff from calling on Mrs. Clark to elect; that at any rate the plaintiff's claim could not be enforced as against the mortgagees who were purchasers without notice; and that the plaintiff, having concurred in the lease with the trustees of the settlement, had * abandoned any right to insist on putting Mrs. Clark to * 303 her election. They also cited *Butricke v. Broadhurst*, (b) *Wake v. Wake*. (c)

Mr. T. Parker, Jr., appeared for the mortgagees, who had joined in the petition of appeal; but the Lord Chancellor refused to hear counsel for the mortgagees separately from the plaintiff.

Mr. Keene appeared for the surviving trustee.

Mr. Bethell and *Mr. Kinglake*, for the plaintiff, contended that the words of the will were an apt description of the entirety, and that this was made clear by the use of the possessive pronoun "my," *Shuttleworth v. Greaves*; (d) that the facts of the case afforded sufficient evidence that Mrs. Clark had elected; that the lapse of time was no bar to the plaintiff's claim, the interest of Mrs. Clark being reversionary, and a remainder-man not being bound to assert his right in the lifetime of the tenant for life: *Duke of Leeds v. Earl of Amherst*; (e) that as to the mortgagees being purchasers without notice, it was clear that they could not have taken the mortgage without an inspection of the will of J. Cox, and must thus have had notice of the state of the title; that the plaintiff, by concurring in the lease of 1833, had not affected his right, the reservation of rent to several lessors being in law presumed to be referrible to each lessor, according to his interest in the property leased. They also cited *Rumbold v. Rumbold*. (g)

Mr. Malins, in reply.

(a) 4 Beav. 108.

(b) 1 Ves. Jr. 171.

(c) *Ib.* 335.

(d) 4 M. & C. 35.

(e) 2 Phil. 117.

(g) 3 Ves. 65.

* 304 *THE LORD CHANCELLOR delivered out to the parties the following judgment, previously to resigning the Great Seal.

Two questions are raised by this appeal : first, whether the case be one of election, and secondly, whether a binding election has taken place.

The facts are these : John Cox the younger, the testator upon whose will the questions arise, was, at the time of making his will, entitled in fee to undivided moieties of two freehold houses at Tottenham : one tenanted by one Upton, and the other by one North. The testator's niece Mary Cox Clark, then an infant, was entitled to the other moiety of the two houses, but subject to the estate of her father Henry Brown, a tenant by the curtesy. The testator was also entitled to one moiety of a leasehold house in Park Street. By his will, dated the 20th March, 1812, the testator gave and devised to Catherine Padbury, the plaintiff's mother, all, &c. (His Lordship here referred to the will in the terms above set out.)

The first question depends upon the devise of the house and premises at Tottenham, tenanted by Upton. The testator was entitled to one moiety only, and his niece Mary Cox Clark to the other moiety ; the gift is in favour of the plaintiff, and the question is, was it intended to apply to the testator's moiety only, or did he intend to give the whole of the house and premises to the plaintiff ?¹ If he intended by the words used to include and give the whole, it is immaterial from what cause that intention proceeded, whether he forgot or misunderstood his rights, and assumed that he was entitled to take the whole of that house to himself, leaving the other of which he was also entitled to * one moiety to his niece, who was entitled to the other moiety of it.

¹ In order to raise a case of election, there must appear in the will or instrument itself a clear intention on the part of the author of it to dispose of that which is not his own. *Forrester v. Cotton*, 1 Eden, 581; *Judd v. Pratt*, 13 Ves. 168; 15 Ves. 390; *Blake v. Bunbury*, 4 Bro. C. C. 21; S. C., 1 Ves. Jr. 514; *Rancliffe v. Lady Parkyns*, 6 Dow. 149, 179; *Dillon v. Parker*, 7 Bligh, N. S. 325; 1 Cl. & F. 303; *Jervoise v. Jervoise*, 17 Beav. 566; *Lee v. Egremont*, 5 De G. & S. 348; *Wintour v. Clifton*, 21 Beav. 447; S. C., 26 L. J. N. S. Ch. 218; *M'Elfresh v. Schley*, 2 Gill, 182; *Jones v. Jones*, 8 Gill, 139; *Watson v. Howard*, 1 Md. Ch. Dec. 112; *Philadelphia v. Davis*, 1 Whart. 490; *Timberlake v. Parish*, 5 Dana, 345; *Havens v. Sackett*, 15 N. Y. 365; 2 Story Eq. Jur. § 1086; *Dummer v. Pitcher*, 5 Sim. 35; *Blommart v. Player*, 2 S. & Stu. 597; *Seaman v. Woods*, 24 Beav. 372, 381; *Parker v. Carter*, 4 Hare, 400; *Fitzsimons v. Fitzsimons*, 6 Jur. N. S. 641; *Miller v. Thurgood*, 12 W. R. 660.

Looking then to the words used for the purpose of ascertaining what the testator intended to give, I do not find any ground for a doubt as to his intention to give the entirety; the words are ample, complete, and correct for that purpose, but wholly inapplicable to the supposed gift of a moiety only; and if this were matter of any doubt, the terms used in the gift of the moiety of the house in Park Street, in which he did intend to give a moiety only, would strongly corroborate this construction, showing the manner in which he described a moiety of premises when his intention was to give only a moiety. Upon the first question, therefore, I think the declaration and decree of the Vice-Chancellor clearly right, and that the will did raise a case of election against Mary Cox Clark, the owner of one moiety of this property, so that she could not withhold her moiety from the plaintiff who the testator intended should have it under his will, without giving up to him all benefit which she took under the will, being in fact only the testator's moiety of the house in Park Street.¹

The decree, after declaring that the defendant Mary Cox Clark was upon attaining the age of twenty-one bound to elect, declared that, after attaining that age, and before the making of the mortgage, she had duly elected to take under the will, and thereby became bound to convey the moiety of the testator in the premises at Tottenham to the plaintiff, subject to the estate of her father as tenant by the curtesy. In order to try the accuracy of this declaration, the facts and circumstances which followed the death of the testator must be very carefully investigated. The testator died according to the statement in the bill in 1812; at this time his niece Mary Cox Clark was under twenty-one, which

¹ See 1 Jarman Wills (3d Eng. ed.), 428; (4th Am. ed.) 392 [397]; Swan v. Holmes, 19 Beav. 471. In Hyde v. Baldwin, 17 Pick. 303, 308, it is declared by SHAW C. J. to be a well settled rule in Equity, that "a man shall not take any beneficial interest under a will, and at the same time set up any right or claim of his own, even if otherwise legal and well founded, which shall defeat, or in any way prevent the full effect and operation of every part of the will." To the same effect, see also 1 Jarman Wills (3 Eng. ed.), 415; Smith v. Guild, 34 Maine, 443, 447; Weeks v. Patten, 18 Maine, 42; Buist v. Dawes, 3 Rich. Eq. 281; Waters v. Howard, 1 Md. Ch. Dec. 112; George v. Bussing, 15 B. Mon. 558; Hamblett v. Hamblett, 6 N. H. 333; Fulton v. Moore, 25 Penn. St. 468; 2 Story Eq. Jur. § 1075; M'Elfresh v. Schley, 2 Gill, 181, 201; Cauffman v. Cauffman, 17 Serg. & R. 16; Preston v. Jones, 9 Barr, 456; Glen v. Fisher, 6 John. Ch. 33.

* 306 * age she attained in December, 1881; and in 1883 she married the defendant Clark. The act relied upon by the bill, and relied upon also, I presume, by the decree which declares that the testator's niece had elected, is that, upon her attaining twenty-one and before her marriage, her father, who had received the rents of her moiety of the leasehold house in Park Street during her minority, paid her a sum of about 49*l.* as the balance of his receipts, being the proceeds of the moiety of the rents of the leasehold house up to the year 1819 when the lease expired, the whole of the other portion of the rents so received by him on account of his daughter having, as he states (he being examined as a witness), been expended by him in her maintenance during her minority. The result therefore is, that the appellant Mary Cox Clark never was in possession, or in the receipt of the rents or profits of the moiety of the house in Park Street at any time, the lease having expired long before she attained twenty-one; but that her father, having received such rents during her minority, when she attained twenty-one paid over to her and she accepted, a small sum as the balance of such rents, the lease itself having long before expired. This cannot be a stronger case in favour of the alleged election than there would have been if the lease had been still subsisting when she attained twenty-one, and she had herself received 49*l.* on account of the moiety of such rents.

It thus becomes necessary to inquire into the history of the property as against which this election is supposed to have been made; for, if a party being bound to elect between two properties, not being called upon so to elect, continues in the receipt of the rents and profits of both, such receipt, affording no proof of preference, cannot be an election to take the one and reject the other;

* 307 and so, * if the other property be under circumstances that it does not yield rent to be received by the party liable to elect, but such party, particularly if with the knowledge and concurrence of the party entitled to call for such election, deal with this property as her own, it would seem that such acts ought to be equally unavailable to prove an actual election, for in both cases there is, as far as circumstances will admit, an equal dealing with the two properties, and, therefore, an absence of proof of any intention to elect the one and reject the other. Henry Brown being tenant by the curtesy of the moiety of the house at Tottenham, no rent from it could be received by Mary Cox Clark; but it

is admitted, and is indeed part of the statement in the bill, that the appellant Mary Cox Clark, after she attained twenty-one and before her marriage, mortgaged the moiety of the freehold house, which mortgage is now vested in the appellants Pearce and M'Nae; that upon her marriage, in 1833, she settled her moiety upon certain trusts for the benefit of herself, her intended husband, and the issue of the marriage; and that in August, 1833, the plaintiff being in his own right entitled to one moiety, joined with Henry Brown entitled as tenant by the curtesy to a life-estate in the other moiety, and the trustees of the settlement of the appellants William Clark and Mary Cox his wife, in a lease of the entirety of the house and premises, proving that the election in 1831 or at any other time was not considered by any of the parties including the plaintiff himself as having taken place, and showing a dealing with the property against which the election is supposed to have been made, neutralizing at least the receipt of the balance of rent from the property supposed to have been elected.¹

* The defendants insisted, that, whatever the plaintiff's * 308 right may have been to call upon Mary Cox Clark to elect, it has been lost by the lapse of time; but this is answered by the dates. She did not attain twenty-one until 1831, and the bill was filed in 1847. Then and now the interest in the moiety of the premises at Tottenham was reversionary, Henry Brown the tenant by the curtesy being still alive; and the interest in the house in Park Street terminated in 1819, by the expiration of the lease. The defendant Mary Cox Clark, as I understood at the hearing, being now called upon to elect, chooses to take the moiety of the premises at Tottenham, and must therefore account to the plaintiff for the rents received on her account for the moiety of the house in Park Street from the testator's death in 1812 to the expiration of the lease in 1819. She did not indeed receive these rents herself, but they were received either by the trustee Crook, or by her father, for her use; and she electing to take against the will is bound to make good to the disappointed party the value of the property intended for her.²

¹ *Brice v. Brice*, 2 Moll. 21; 1 Jarman Wills (3d Eng. ed.), 441; *Whitridge v. Parkhurst*, 20 Md. 62. As to what acts constitute election, see note to *Dillon v. Parker*, 1 Swanst. 382; *Giddings v. Giddings*, 3 Russ. 241; *Briscoe v. Briscoe*, 1 J. & Lat. 334; *Mahan v. Morgan*, 6 Irish Jur. 173; *Ruttledge v. Ruttledge*, 1 Dow & Cl. 331; *Dewar v. Maitland*, L. R. 2 Eq. 834.

* The doctrine of election proceeds upon the ground of compensation and

The costs of the suit remain now to be considered. In my view of the case the plaintiff has failed in his contention that the defendant Mary Cox Clark had elected to take the half of the house in Park Street. Having upon that ground claimed the half of the premises at Tottenham, it became necessary to make a case of notice against the parties claiming under the mortgage and under the marriage settlement, all which has become useless expense. I am therefore of opinion, that the bill must be dismissed with costs as against such parties; and as against Mary Cox Clark and her husband, so much must be dismissed with costs as prays that it may be declared that an election had been made.

* 309

* COLEMAN *v.* MELLERSH.

1850. February 25, 26, 27. July. Before The Lord Chancellor Lord CORTENHAM.

Principles on which the Court deals with settled accounts in reference to granting relief either by a decree to surcharge and falsify or by a decree to take an open account.¹

In a case where the accounting party was the solicitor or agent of the party sought to be charged, and it appeared that an item of 600*l.* was inserted for professional charges in the account which it was sought to treat as settled, no bill of costs having been delivered, and the 600*l.* exceeding by 75*l.* the sum really due: *Held*, that this was not such an error as could be set right

not of forfeiture. *Key v. Griffin*, 1 Rich. Eq. 67, 68; *Stump v. Findlay*, 2 Rawle, 168; *Cauffman v. Cauffman*, 17 Serg. & R. 16; *Philadelphia v. Davis*, 1 Whart. 490; *Greenwood v. Penny*, 12 Beav. 403; *Streatfield v. Streatfield*, Cas. t. Talb. 176; 1 Lead. Cas. Eq. (3d Am. ed.) 376 [273] *et seq.* and notes; *Kitson v. Kitson*, Prec. in Ch. 351; *Chetwynd v. Fleetwood*, 1 Bro. P. C. 300; *Forrester v. Cotton*, 1 Eden, 532; *Hoare v. Barnes*, 3 Bro. C. C. 316; *Finch v. Finch*, 4 Bro. C. C. 38; *Welby v. Welby*, 2 V. & B. 187; *Abdy v. Gordon*, 3 Russ. 178; *Nottley v. Palmer*, 2 Drew. 93; *Schroder v. Schroder*, Kay, 578-586; 2 Story Eq. Jur. § 1085.

¹ See *Allfrey v. Allfrey*, 1 M'N. & G. 87, 93 and notes; *Brown v. Van Dyke*, Halst. Ch. N. J. 795; 1 Story Eq. Jur. §§ 524, 525; 1 Dan. Ch. Pr. (4th Am. ed.) 667, 668 and notes; *Stoughton v. Lynch*, 2 John. Ch. 209, 217; *Higginson v. Fabre*, 3 Desaus. 93; *Todd v. Wilson*, 9 Beav. 486. For an explanation of the terms *surcharge* and *falsify*, see 1 Story Eq. Jur. § 525.

by a decree to surcharge and falsify, but that the account must be dealt with as an open account.¹

An entry in the diary of a solicitor's clerk who had become lunatic not allowed to be read in evidence of a matter concerning which it was not the duty of the clerk to have made such entry.²

IN this case the defendants Mellersh and Marshall presented two separate petitions of appeal from a decree of the Vice-Chancellor of England, directing the re-opening of certain accounts between them and the late W. Coleman, which were impeached by the plaintiff.

The bill, which was very voluminous, was filed in June, 1845, by Mary Coleman, the widow and administratrix of W. Coleman, and in substance stated that, in the year 1829, W. Coleman being desirous of purchasing certain tithes at Dorking, with a view to a resale thereof to the owners of the land subject to such tithes, and being in want of the necessary capital to complete the purchase, applied to Messrs Mellersh and Marshall solicitors at Godalming, who were employed by him in the business, and who agreed to provide him with the required amount in consideration of receiving a bonus exclusive of their professional charges (with regard to the amount of this bonus, there was a discrepancy in the statements of the defendants, one alleging it to be 500*l.* and the other 1000*l.*).

The bill then charged that there had been no actual delivery of accounts by the defendants so as to enable W. Coleman to examine them; that there were apparent errors on the face of the accounts, and that the bonus alone was a sufficient ground for invalidating * any alleged settlement between the parties. The * 310 bill prayed a general account of all dealings and transactions between the defendants and W. Coleman.

It appeared that the transactions between W. Coleman and the defendants formed the subject-matter of seven accounts, extending

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 667, 668; *Matthews v. Walwyn*, 4 Ves. 118; *Story Eq. Pl.* § 800; 1 *Story Eq. Jur.* § 523, and note; *Middleditch v. Sharland*, 5 Sumner's Ves. 87 note (a); *Hickson v. Aylward*, 3 Moll. 1; *Flocton v. Peake*, 12 W. R. 562.

² But in an action by a bank against a depositor for money overdrawn, the books of the bank are competent evidence to show receipts and payments of money; and if the clerk who made the entries is dead, or insane, the book is admissible upon proving his handwriting. *Union Bank v. Knapp*, 3 Pick. 96; *Shove v. Wiley*, 18 Pick. 558, 564.

over the period between 1829 and 1832. It was admitted by the defendants that the first account, amounting to 3200*l.*, and for which W. Coleman had given a mortgage security dated the 28th October, 1830, had not been signed by W. Coleman, and that it contained an item of 600*l.* for professional charges in respect of which no bill of costs had been sent in. It appeared also, by a reference to the book from which the account must have been taken, that the real amount for professional charges could only have been 524*l.* 18*s.* 4*d.* According to the evidence of Mr. Limbird, a clerk of the defendants, the difference was accounted for, by stating that there were certain fees to be paid to counsel and other expenses, which at the time it was agreed between W. Coleman and the defendants should be considered as included in and settled by the payment of the sum of 600*l.* It was endeavoured to be proved by the evidence of this clerk, that W. Coleman had carefully inspected the accounts, and had all the documents connected therewith produced to him. The six subsequent accounts were all signed by W. Coleman, the 7th and last containing an item of 500*l.*, which was treated in the argument as being in respect of the bonus.

How the facts of the case really stood on the subject of the bonus did not very distinctly appear. There was an indenture without date, but proved to have been executed on the 14th May, 1830, by which W. Coleman secured to the defendants a
 * 311 sum of 500*l.* * with interest, but it appeared by a memorandum, dated the 14th May, 1830, that only one-half of this sum was then actually due. It was said by the defendants that this 500*l.* had nothing to do with the bonus, and also that the deed was never acted on, the 500*l.* secured by it being brought into the first of the seven accounts, and forming part of the 3200*l.* in respect of which the mortgage of the 28th October, 1830, had been given by W. Coleman.

Mr. Bethell, Mr. Roundell Palmer, and Mr. Hamilton Humphreys, for the plaintiff, and in support of the Vice-Chancellor's decree, submitted that the fact of there having been no delivery of the first account alleged to have been settled, coupled with the fact that it contained an item exceeding by 75*l.* the amount really due or for which there was any vouchers, was of itself sufficient to invalidate the settlement and subject the accounts to taxation:

Horlock v. Smith. (a) They referred also to *Pickering v. Pickering.* (b)

Mr. Stuart and *Mr. G. M. Giffard*, for the defendant Mellersh, contended that there was no evidence of fraud to set aside the accounts which had been examined and signed, and that nothing short of positive fraud was sufficient to open accounts which had been settled: *Alfrey v. Alfrey*; (c) that although no bill of costs had been actually delivered for the 600*l.*, the mere non-delivery was not sufficient to invalidate a settlement, especially where the party to be charged, as in this case, had access at all times to the books from which the bill of costs could only have been a copy. They relied on the case of *Hiles v. Moore*, (d) as being * precisely in point; and distinguished the present from the * 312 cases relied on by the plaintiff, and from such cases as *Morgan v. Lewes* (e) and *Waters v. Taylor.* (g)

Mr. Rolt and *Mr. Fleming*, for the defendant Marshall, contended that the absence of W. Coleman's signature to the first of the accounts could not invalidate the settlement, as all his subsequent acts were consistent with an approval of it: *Willis v. Jernegan*; (h) that in respect of the bonus, there was no case which decided that a solicitor might not receive a gratuity: *Harris v. Tremenheere*; (i) and that in the present instance such relationship did not in fact subsist, the transactions between the parties as solicitor and client being concluded; that as to the 600*l.*, of which sum 524*l.* was for business actually transacted, it was clearly not competent after the deliberate approval of the account by W. Coleman, for his representative to call it in question. They submitted that the decree of the Vice-Chancellor opening all the accounts, on the ground of error in the first account, could not be supported, there being no balance carried forward nor any connection between the first and subsequent accounts; and that the bill did not pray any specific relief as to opening settled accounts, nor did it seek to surcharge and falsify.

Mr. Bethell, in reply. — The bill does not state that the accounts

(a) 2 M. & C. 495.

(b) 2 Beav. 31.

(c) *Ante*, Vol. I. p. 87.

(d) 17 Law J. Ch. 385.

(e) 4 Dow, 29.

(g) 2 M. & C. 526.

(h) 2 Atk. 251.

(i) 15 Ves. 31.

were settled, but represents them as alleged to have been settled, and contains specific charges to show their invalidity: the prayer, therefore, for a general account is correct. *Newman v. Payne*, (a) *Jenkins v. Gould*. (b) No bill of costs was ever delivered, * 313 and * the gratuity, therefore, entered into the whole transaction. *Montesquieu v. Sandys*, (c) *Crossley v. Parker*. (d) The case of *Hiles v. Moore*, (e) relied on on the other side, is at variance with the doctrine laid down by your Lordship in *Horlock v. Smith*. (g)

In the course of the argument, the defendant Mellersh being desirous of proving that the plaintiff's testator had gone over the accounts with one of the defendants' clerks, since become lunatic, proposed to read from the diary of the clerk a memorandum to this effect. The reception of this evidence was objected to.

It was contended, however, that both on principle and authority the diary was admissible; that it was the business of the clerk to audit the accounts with W. Coleman, and that the entry was contemporaneous with the transaction; that insanity was equivalent to death: *Bernett v. Taylor*, (h) Phillips on Evidence, Vol. II. p. 210; and that under such circumstances, proof of handwriting was all that was requisite. *Patteshall v. Turford*, (i) Phillips on Evidence, Vol. I. p. 322.

THE LORD CHANCELLOR, however, was of opinion that the evidence was inadmissible, observing, that it appeared to be nothing else than a mere private memorandum, and that it was no part of the clerk's business to have made it.

* 314 * THE LORD CHANCELLOR delivered out to the parties the following judgment previously to resigning the Great Seal.

The decree appealed from directs an open account to be taken between the late Mr. Coleman and Messrs. Mellersh and Marshall attorneys at Godalming. The petition of appeal not only disputes the propriety of this direction, but prays that the bill may be dismissed. This is proved by the defendants' own case to be an un-

(a) 2 Ves. Jr. 199.

(b) 3 Russ. 385.

(c) 18 Ves. 313.

(d) 1 J. & W. 460.

(e) 17 Law J. Ch. 385.

(g) 2 M. & C. 495.

(h) 9 Ves. 381.

(i) 3 B. & Ad. 890.

tenable proposition, as will appear from the observations I am about to make. The only question is, whether the case proved justified the decree as pronounced, or whether it ought to have been limited to a direction that the plaintiff should be at liberty to surcharge and falsify the accounts relied upon by the defendants as settled accounts.

There is a material difference in the principle on which the Court deals with settled accounts with reference to those two kinds of decrees, as there undoubtedly is in the effect in working them out. A settled account, otherwise unimpeachable, in which an error is proved to exist, may be subjected to a decree to surcharge and falsify, upon the supposition that one error having been proved others may be expected upon investigation to be discovered; but if the relative situation of the parties, or the manner in which the settlement took place, or the nature of the error proved, show that the alleged settlement ought not to be considered as an act binding upon the party signing, and that it would be inequitable for the accounting party to take advantage of it, the Court is not content with enabling the party to surcharge and falsify an account which never ought to have been so settled, but directs the taking of an open account. Amongst *the grounds on which the * 315 Court rests the application of this principle, none are stronger than the fact that the accounting party was the solicitor or agent of the party sought to be charged, or that the circumstances gave him a commanding power or influence over him, or that the facts prove that he possessed and abused the confidence which had been reposed in him: all these appear to me to concur in the present case.

It is not possible from the evidence to ascertain with certainty at what time the late Mr. Coleman first became the client of Messrs. Mellersh and Marshall; nor does it seem to me to be very material, notwithstanding the anxiety displayed by Mr. Limbird, the witness for the defendants, to fix it at the autumn of 1829. I cannot doubt but that their engagement with him, and their stipulation for a bonus over and above their professional charges was correct, and arose from the application by him for their assistance in carrying into effect the purchase and resale of the tithes. If Mr. Coleman was not a client of Messrs. Mellersh and Marshall at the time this stipulation was made, it is clear that it was the condition upon which they would undertake the duties of their professional calling.

His Lordship here referred to the circumstances above stated, in reference to the undated indenture, and to the memorandum of the 14th May, 1880, and then proceeded as follows:—

It would seem clear that the 500*l.* mentioned in this memorandum was the same 500*l.* for securing which the undated deed was executed; and Limbird says that such 500*l.* was brought
 * 316 into the account upon which * 3200*l.* was made to appear to be due from Mr. Coleman, and for which the security of the 28th of October, 1880, was given, and that the 500*l.* therein mentioned was the 500*l.* agreed to be given as a bonus to Messrs. Mellersh and Marshall. If such were the facts, the case would be that of a bonus in consideration of future profits, secured with interest from the date, taken by an attorney from his client, under an account and by a deed representing that the whole 500*l.* was an actual debt, the attorney by the memorandum acknowledging that half the sum only was actually due. It was argued at the bar, on behalf of Mr. Marshall, that the 500*l.* for which the undated security was given had nothing to do with the bonus: if the proposition were admissible and true, the position of the solicitor would not be improved. The security represents 500*l.* as actually due, and which if it did not consist of the bonus must have consisted of advances or costs, and provides for interest at 5*l.* per cent from the date, and the memorandum admits that this statement is false, and that 250*l.* only had been paid. It was said that interest was never charged upon this 500*l.*, but the solicitors took by their security the means of compelling payment of interest, and I am considering the transaction for the purpose of ascertaining the position in which they had placed themselves with reference to their client, and how they had used the power and influence they had acquired over him and his affairs. These transactions are left in total obscurity by the defendants, whereas they might, if the facts were sufficient for their purpose, have proved how the 250*l.* had become due, and how the remaining 250*l.* had been subsequently advanced so as to entitle them to the whole 500*l.*; but this not having been done it must be assumed upon the ground of the memorandum alone, that the 250*l.* remains wholly unac-
 * 317 counted for, * the 500*l.* having been treated as the amount of the debt.

The Vice-Chancellor decided this case principally upon the item of 600*l.* for costs in the bill, making 3200*l.* due from Mr. Cole-

man; and although there is much more in the case, I think that item quite sufficient to support his decree. It is proved that at this time the costs of the solicitors against their client amounted to 524*l.* 18*s.* 4*d.*, composed in part of items which could have been allowed on taxation, but which I think it unnecessary to consider, for the sum of 524*l.* 18*s.* 4*d.* was the whole that, according to their statement, they could have been entitled to demand: 600*l.* however was charged as due to them for costs. Mr. Limbird their witness and clerk endeavoured to account for this by stating, that there were heavy fees to counsel then due and unpaid not included in their bills, and that the 524*l.* 18*s.* 4*d.* was raised to 600*l.* in order to provide for such fees. This, however, is not the ground taken by the defendant Marshall, who says in his answer that such addition was made at the client's request as an additional remuneration; but of this statement, or of the amount of fees due, no evidence is given.

It must therefore be assumed, that the 3200*l.*, for which the security of the 28th of October, 1830, was given, consisted in part of 600*l.* claimed as the amount of bills of costs, but of which no bills of that amount existed, and the amount in the books of the solicitor being considerably less than that sum. This is not only an error in the sense in which the term is used for the purpose of opening accounts, but a misstatement and false representation, designedly made. It cannot be attributed to the bounty of the client, for of that * or of any such intention there is no * 318 proof; and if in anticipation of costs not paid or ascertained, and such costs have not been proved to have subsequently become due, it is obvious that the security at the utmost can only be available for what may upon investigation be found to be due.

After what I have already observed upon, it appears to me to be unnecessary to say any thing upon the minor points which arise upon an examination of this account making the 3200*l.* due. These more important points prove not only that the account was erroneous, but that the dealings were such as could not be maintained between any parties, and certainly not as between solicitor and client.

It was, indeed, argued from the pressure of the case that, whatever errors there might be in the first account, the subsequent accounts would not be affected by it, inasmuch as there were no

balances on either side, and that the suppression of a balance really due or destroyed by a false debit would not affect a subsequent account: but it is clear that all the subsequent accounts are affected by the vices of this first, and indeed except from the additional difficulties in which Mr. Coleman was afterwards involved, the relative situation of the parties was not altered by the subsequent transactions.

I am therefore of opinion, that the Vice-Chancellor's decree was correct, and that the petition of appeal must be dismissed with costs.

* 319

* EVANS *v.* PROTHERO.

1850. March 9. July. Before the Lord Chancellor Lord COTTENHAM.

A receipt not having a proper stamp cannot be used as evidence of a matter collateral to the payment of the money.¹

Thus, in a case where it was sought to prove an agreement for purchase by means of a receipt for the purchase-money, such receipt not being properly stamped: *Held*, that the evidence could not be admitted.²

IN this case Vice-Chancellor WIGRAM, by a decree made on the hearing of the cause on the 9th April, 1848, directed the trial of two issues: first, whether an agreement had been entered into by and between one Evan Richards and his brother Jenkin Richards, for the purchase of premises situate in the parish of Merthyr Tydvil in the county of Glamorgan; and, secondly, whether the purchase-money was paid in pursuance of this agreement.

These issues were tried at Cardiff on the 19th July, 1848, and the plaintiff's counsel, in the course of his address to the jury,

¹ In *Evans v. Prothero*, 1 De G., M. & G. 372, 375, Lord St. LEONARDS L. C. held that the document in this case was receivable as evidence of an agreement, though by reason of the fiscal regulations of the country, not as evidence of a receipt. See 1 Dan. Ch. Pr. (4th Am. ed.) 880; *Blair v. Bromley*, 11 Jur. 617, L. C., and cases there cited.

² See *Evans v. Prothero*, 1 De G., M. & G. 372; 1 Dan. Ch. Pr. (4th Am. ed.) 880, 881, 981. But see *Carpenter v. Snelling*, 97 Mass. 452; *Lynch v. Morse*, 97 Mass. 458 in note; *Tobey v. Chipman*, 13 Allen, 123; *Govern v. Littlefield*, 13 Allen, 127 note; *Willey v. Robinson*, 13 Allen, 128 note; *Disbrow v. Johnson*, 3 C. E. Green (N. J.), 36.

read a document which he said he should prove in evidence, which document purported to be a receipt for 21*l.* as the consideration money mentioned in and paid by the purchaser, upon and before the execution of the said agreement. The following is a copy of the document:—

“Recd. this 25th August, 1827, of Mr. Jenkin Richards now and before the sum of twenty-one pounds being the amount of the purchase of 3 tenements sold by me adjoining the river Taff: received the contents. Witness, John Swaine—Evan Richards.+”

This document was originally impressed with a sixpenny stamp, but when produced it had an additional stamp of 1*l.* Mr. Justice WIGHTMAN, under these circumstances, refused to receive the document in evidence. The jury found a verdict for the plaintiff on both issues, although Mr. Justice WIGHTMAN directed them that no evidence had been produced to prove the agreement.

* The defendants then applied to Vice-Chancellor WIGRAM * 320 on the 6th December, 1848, for a new trial, but his Honor refused the application. The defendants appealed to the Lord Chancellor, who, on the 16th March, 1849, directed a new trial of the issues, holding that no evidence of the agreement and purchase had been produced.

The new trial took place at Cardiff, on the 16th and 17th August, 1849, when the above-mentioned document was again tendered in evidence by the plaintiff. Its reception was objected to by the defendant, who contended that the document was not an agreement or conveyance of the premises in question; but Mr. Baron PLATT overruled the objection. The jury gave a verdict for the plaintiff on both issues. It did not very clearly appear whether any distinct objection was taken to the reception of the document in question on the ground that the receipt stamp was insufficient.

The defendant then moved before the Vice-Chancellor for a new trial; and his Honor, on the 4th December, 1849, refused the application as to the first issue, but granted it as to the second.

The defendant now appealed to the Lord Chancellor. The plaintiff also asked to discharge the order of the Vice-Chancellor granting the new trial of the second issue; but the discussion before his Lordship was confined to the question raised by the defendant.

Mr. Walker, for the defendant. — The question here is, whether a document being a receipt of purchase-money can be used in evidence for a collateral purpose. The Vice-Chancellor held that it could, considering this case as ruled, in favour of receiving the evidence by the decision of the House of Lords in *Matheson v. Ross*. (a)

* 321 * *The Solicitor-General* (Sir JOHN ROMILLY) and *Mr. James*, contra, relied on *Matheson v. Ross*, (a) and cited *Horsfall v. Key*. (b) They contended that, for the purpose for which the document was used, no receipt stamp at all was necessary.

Mr. Walker, in reply.

July.

THE LORD CHANCELLOR delivered out to the parties the following judgment, previously to resigning the Great Seal.

It is with the greatest reluctance that I find myself under the necessity, in this case, of directing a new trial. The property is very small, and the parties apparently very poor: but the litigation both at law and in equity must have been very expensive, and though long protracted, has up to the present time produced no satisfactory result.

The issues were, first, whether Evans had agreed to sell the property in question to Jenkins, and if he had, secondly, whether the purchase-money had been paid. At the trial a paper was produced, purporting to be a receipt for the purchase-money, but it had not a proper receipt stamp. It seems doubtful how far the objection to the stamp as a receipt stamp was raised; but the judge's notes prove that he had observed that there had been a sixpenny stamp, which it is not contended was the proper stamp for the sum, that being 21*l*.

The fact of the payment of the consideration money was a most important fact upon both the issues; upon the latter it was

* 322 the whole question, and upon the first * it was one of the means by which the affirmative might be established. The agreement might itself have been proved, a conveyance might have been proved which would have assumed and so proved the

(a) 2 H. L. 286.

(b) 17 Law J. Exch. 266.

agreement, or payment of the consideration money might have been proved which might have assumed the fact of the agreement.¹ Upon both issues, therefore, the fact of payment was of the utmost importance, and went directly to the matter in issue; and if the document in question was properly received in evidence, and the jury were right in giving credit to it as genuine, the conclusion of the jury in favour of the plaintiff could not with any prospect of success have been disputed. But the question is, was that receipt, not being upon a proper receipt stamp, receivable upon these issues. It had been rejected at a former trial by Mr. Justice WIGHTMAN, but was received upon the last trial by Mr. Baron PLATT; and it was contended before me, that, though it could not have been received to prove payment of the money, the object in this case was not to prove such payment, but an object quite collateral, namely, to establish the fact of the agreement; and a recent case of *Matheson v. Ross (a)* was relied upon for this distinction. I have carefully examined that case. The House of Lords proceeded upon the ground, that the paper there in question, though there was upon it a receipt for a balance, was also a statement and settlement of accounts, which was quite unconnected with the fact whether the balance had or had not been paid, which was not in question in the case; and the House thought that, for the purpose of showing the state and balance of the account, the paper might be received, that being altogether collateral to the object and purpose of the paper as a receipt; and I find that I am reported as having qualified my opinion in favour of the admissibility of the * document by these * 323 observations: "Most of the cases go to show this, that if, in a particular instance, the matter to be proved is the payment of money, and the payment is to be proved by the production of a written document, of an acknowledgment of payment, or what is called a receipt, the Stamp Acts immediately apply to such document so produced, and for such a purpose, whether it is for the direct purpose of proving payment as a discharge between debtor and creditor, or whether it is for an indirect and collateral purpose, as to show some right in, or advantage belonging to, a party, in consequence of such payment; where, for instance, a matter collateral is to be proved by the proof of the fact of pay-

(a) 2 H. L. 286.

¹ See *Hurley v. Brown*, 98 Mass. 546.

ment, and that fact of payment is established by a receipt, such a case is clearly within the provisions of the Stamp Acts: that, however, is not the present case." It is, however, the case now under my consideration. The object of producing the document is to prove the fact in the issue called collateral; namely, the agreement, by proof of the fact of payment, and that fact of payment is attempted to be established by a receipt not having a proper stamp.

It appears to me, therefore, that under and upon the principle of the case quoted, the document ought not to have been received; and as I cannot doubt but that the verdict of the jury was much influenced by that document, I am compelled to send these issues to another trial. (a)

* 324

* BETWEEN

The SHREWSBURY and BIRMINGHAM Railway Company Plaintiffs.

AND

The LONDON and NORTH-WESTERN Railway Company, the SHROPSHIRE UNION Railways and Canal Company, GEORGE CARR GLYN and WILLIAM COWAN¹ . . . Defendants.

1850. February 19, 20, 23. Before the Lord Chancellor Lord COTTENHAM.

A bill before Parliament for the purpose of enabling one railway company to grant to another railway company a lease of certain contemplated lines of railway, was opposed by a third company. An agreement was ultimately come to, by which, in consideration of the third company withdrawing their opposition, the other two companies engaged to conduct their traffic in a certain specified manner, so as not to prejudice the interests of the third company. *Held*, overruling demurrers filed to a bill by the third company for a specific performance of this agreement, that there was nothing in the

(a) The judgment containing no direction on the subject of costs, the case was spoken to on this point, before the Lord Chancellor, Lord TRURO, on the 30th January, 1851; when his Lordship, after consulting with the Registrar, considered that the costs could not, under these circumstances, be dealt with in the order to be drawn up. His Lordship, however, suggested (in which suggestion the counsel on both sides concurred) that the costs should be treated as costs in the cause.

¹ S. C., 16 Beav. 441; 3 M'N. & G. 70; 4 De G., M. & G. 115; 6 H. L. 113.

agreement contrary to the duty which the parties respectively owed to Parliament, or to the public and their own subscribers.¹

Held, also, on the construction of the Act of Parliament, that the operation of the agreement was not postponed until all the contemplated lines were completed; but that the rights and liabilities of the two companies *inter se*, on which the agreement with the third company depended, arose on the completion of any one of the contemplated lines. •

THE bill in this case was filed on the 17th December, 1849, by the Shrewsbury and Birmingham Railway Company, for the specific performance of an agreement entered into between them and the two defendant companies, and for an injunction to restrain the breach of that agreement. The chairmen of the two companies were made defendants to the suit. To this bill the defendant companies severally demurred, and these demurrers having been allowed by the Vice-Chancellor of England, the case now came on by way of appeal before the Lord Chancellor.

The subject-matter of contest between the parties had relation to the rights of the three several companies, plaintiffs and defendants, to the railway traffic between * Rugby and * 325 Shrewsbury and *vice versa*, including the traffic between certain of the intermediate stations. On looking at a map, it will be seen that there exist two great lines of communication between Rugby and Shrewsbury, one a direct route passing through Birmingham, Wolverhampton, and Wellington, and the other a very circuitous route passing through Stafford, and falling into the direct route at Wellington. At the time when the transactions in question in this suit commenced, the London and North Western Railway Company (having a railway from London to Rugby) held under their control the line of communication between Rugby and Stafford; they had also a line of railway between Rugby and Birmingham, with the power of making a railway from Birmingham to Wolverhampton, the route between these places being leased to them in perpetuity by the Stour Valley Railway Company. At this time, the Shrewsbury and Birmingham Railway Company had a railway from Shrewsbury to Wolverhampton, passing through Wellington, with a right reserved to them of running over the Stour Valley line from Wolverhampton to Birmingham. The Shropshire Union Railways and Canal Company were at the same

¹ But see *post*, 356 n. (1); S. C., 4 De G., M. & G. 115 n. (2); *Taylor v. Chichester and Midhurst Railway Co.*, L. R. 2 Exch. 357; *Angell & Ames Corp.* (9th ed.) § 256, and cases in notes.

time constructing a railway between Shrewsbury and Stafford through Wellington, a portion of this line, namely, between Shrewsbury and Wellington, being common to them, and the Shrewsbury and Birmingham Railway Company, and being managed by the two companies jointly. Under these circumstances, negotiations were entered into between the London and North Western Railway Company and the Shropshire Union Railways and Canal Company, the object of which was to enable the former to use the line of the latter company between Stafford and Shrewsbury, through Wellington. It will be seen that the London and

North Western Railway Company would be thus able, by
 * 326 a circuitous * route, to carry passengers and goods between Rugby and Shrewsbury, and *vice versa*. The London and North Western Railway Company had the means of carrying on traffic between Stafford and Wolverhampton by a line from the former place stopping at Portobello about a mile short of Wolverhampton, and also of carrying on traffic between Wolverhampton and Birmingham by a separate line from that leased to them by the Stour Valley Railway Company. A scheme was also in contemplation of making a communication between Gnosall and Wolverhampton, the former of these places being situated on the line between Stafford and Wellington. Such being the position of matters, the Shrewsbury and Birmingham Railway Company became apprehensive that they would lose a great portion of the advantage contemplated from their line, both as a means of a through traffic between Shrewsbury and Rugby, and of direct traffic between Shrewsbury and Wolverhampton and Birmingham, as the London and North Western Railway Company would have the means of carrying passengers and goods between Shrewsbury and Rugby by Stafford, and also of avoiding the plaintiffs' line between Wellington and Wolverhampton as a means of communication between Shrewsbury and Wolverhampton and Birmingham. These circumstances, and the conflicting interests arising out of them, gave occasion to the transactions between the parties detailed in the bill as hereinafter mentioned, and out of which the several questions in the suit arose. It appeared that at the time the bill was filed the line of railway between Wolverhampton and Birmingham had not been completed, the part left unfinished being under the control of the London and North Western Railway Company.

The statements in the plaintiffs' bill were to the following

effect: that in the year 1846 the plaintiffs * were an in- * 327
 incorporated company for the purpose of making a railway
 from Shrewsbury to Wolverhampton; that such railway was identi-
 cal with part of the line of a projected railway from Shrewsbury
 to Stafford, for which a bill was then pending in Parliament, at the
 instance of the defendants the Shropshire Union Railways and Ca-
 nal Company; that it was provided by the plaintiffs' Act, that if
 such bill were obtained, then that portion of the line which was
 common to both railways should be constructed at the joint expense
 and managed by a joint committee of both companies; that in the
 session of 1846 the Shropshire Union Railways and Canal Company
 had obtained three separate Acts of Parliament, by the first of
 which the Shropshire Union Railways and Canal Company were
 incorporated, with powers to make a railway from the Chester and
 Crewe Branch of the Grand Junction Railway to Wolverhampton,
 by the second they were empowered to make the line above men-
 tioned from Shrewsbury to Stafford with branches, and by the third
 they were empowered to make a railway from Newtown to Crewe
 with branches; that in the session of 1847 the London and North
 Western Railway Company were empowered to make a railway
 from Portobello on their line to Wolverhampton; that the Shrop-
 shire Union Railways and Canal Company were incorporated and
 empowered to make the three several lines of railway, on the
 ground, among others, that, if made, they would be competing
 lines with the London and North Western Railway Company.

The bill then stated that in the session of 1847 the London and
 North Western Railway Company applied to Parliament for the
 purpose of obtaining an Act to enable them to take and accept, and
 the Shropshire Union Railways and Canal Company to grant, a
 lease of the undertaking of the Shropshire Union Railways
 * and Canal Company, and that inasmuch as the London * 328
 and North Western Railway Company would in the event
 of their obtaining such lease be enabled to command the whole
 traffic between Shrewsbury and Birmingham to the entire destruc-
 tion of the Shrewsbury and Birmingham Railway Company, and
 inasmuch as the Shropshire Union Railways and Canal Company
 had obtained their Acts of incorporation and power to construct
 the several lines of railway in the bill mentioned, upon the pre-
 tence that their interests would be enlisted on the side of those of
 the plaintiffs in competition with those of the London and North

Western Railway Company, the plaintiffs opposed such application, and in consequence a negotiation was opened between the London and North Western Railway Company and the Shropshire Union Railways and Canal Company on the one part, and the plaintiffs on the other part, with a view to the plaintiffs withdrawing their opposition to the application ; and that on or about the 13th May, 1847, an agreement was made and entered into between the plaintiffs and the London and North Western Railway Company and the Shropshire Union Railways and Canal Company, which was in the words and figures following, that is to say, "London, 13th May, 1847. 1st. That all traffic up and down between Shrewsbury or Wellington or intermediate stations and Rugby, or any point on the London and North Western Railway to the south of Rugby, shall be kept separate and divided between the two companies in proportion to the mileage travelled over each of the lines of the Shrewsbury and Birmingham and Shropshire Union Companies, such joint account and division however to be optional with the Shrewsbury and Birmingham Company: this arrangement to include all the London traffic, by whatever route it may pass. 2d.

That the Shropshire Union Company or London and North * 329 Western Company shall not, during the continuance of * such joint account and division of traffic, convey from Wellington or any part of their lines westward of Wellington any goods or passengers to any part of the Shrewsbury and Birmingham line east of the same place, or be in any way entitled to participate in such traffic. 3d. The three directors forming and to form the joint committee for the management of the Shrewsbury and Wellington line shall at no time be directors of the London and North Western Company. 4th. An agreement to be forthwith prepared for carrying out this arrangement, and any question as to the construction of the terms to be left to Mr. Robert Stephenson. — Robert Stephenson. Charles Parker."

The bill then stated that, in consideration of such agreement the plaintiffs withdrew their opposition, and that thereupon the Act of Parliament, 10 & 11 Vict. c. 121, empowering the London and North Western Railway Company to accept a lease of the undertaking of the Shropshire Union Railways and Canal Company, was passed, whereby it was enacted that, on the completion of the works of the railways by the therein recited Acts authorized to be made, so as to be opened for public traffic, or at such earlier period as

might be agreed upon between the companies, the Shropshire Union Railways and Canal Company should and they were thereby empowered and required to grant, and the London and North Western Railway should and they were thereby empowered and required to accept, a lease in perpetuity of the undertaking of the Shropshire Union Railways and Canal Company at the rent and upon the terms therein mentioned ; and it was further enacted, that from and after the passing of such Act the undertaking of the Shropshire Union Railways and Canal Company should, subject to the provisions therein contained, be managed by a joint committee, to consist * of eight of the directors of the Shropshire Union Rail- * 380 ways and Canal Company, and eight of the directors of the London and North Western Railway Company ; and, by the 11th section, it was enacted that, when and as each of such railways should be completed and opened, the same should be worked and used by the London and North Western Railway Company, who should observe all such directions in relation thereto as such joint committee should make, consistently with the provisions of the Act and of the lease to be granted in pursuance thereof, and for the purposes of such working and use the London and North Western Railway Company and their officers, agents, and servants should have, use, and exercise all such powers and privileges in relation to every such completed railway as were granted to the Shropshire Union Railways and Canal Company and their officers, agents, and servants by the Act authorizing them to maintain and work and use such railway and as if the name of the London and North Western Railway Company had been inserted in such Act in lieu of the name of the Shropshire Union Railways and Canal Company, and so from time to time as each of such railways should be completed ; and it was thereby enacted that the London and North Western Railway Company should cause separate accounts to be kept of all receipts upon or in respect of the undertaking thereby authorized to be leased, or so much thereof as should from time to time be under the power of the London and North Western Railway Company by virtue of the Act, and the books of such accounts and of all accounts of expenditure upon or in respect of each of such railways should be open at all reasonable times to the inspection of any of the directors of the Shropshire Union Railways and Canal Company or of any person duly appointed by such directors to inspect the same ; and it was thereby * enacted that, * 331

until the lease of such railways thereby authorized should be completed, all the profits derived from so much of the canals and the works and property connected therewith of the Shropshire Union Railways and Canal Company as should not have been converted into or used for the purposes of such railways should be applied in the manner therein mentioned.

The bill then stated that shortly after the passing of the Act 10 & 11 Vict. c. 121, the following articles of agreement, under the respective seals of the three companies, were duly made, entered into, and executed by such companies, that is to say, articles of agreement made this 12th day of October, 1847, by and between the Shrewsbury and Birmingham Railway Company of the one part, and the London and North Western Railway Company and the Shropshire Union Railways and Canal Company of the other part: whereas the line of railway in course of formation between Shrewsbury and Wellington is common to the said Shrewsbury and Birmingham Railway Company and the said Shropshire Union Railways and Canal Company, and is under the direction and control of a joint committee of management; and whereas a bill was introduced into Parliament during the last session for authorizing a lease in perpetuity of the undertaking of the said Shropshire Union Railways and Canal Company to the said London and North Western Railway Company, and the same was opposed by the said Shrewsbury and Birmingham Railway Company; and whereas the said Shrewsbury and Birmingham Railway agreed to withdraw their opposition to the said bill on its being arranged and agreed between the said several companies that the covenants and agreements hereinafter contained should be mutually entered into by them on an Act of Parliament being obtained

* 332 * for authorizing such lease as aforesaid or for a lease between the said parties of any part of the said undertaking between Shrewsbury and Stafford; and whereas such Act was obtained during the last session of Parliament: Now, therefore, these presents witness and it is hereby covenanted, declared, and agreed by and between the said several companies parties hereto, the said London and North Western Railway Company and Shropshire Union Railways and Canal Company covenanting and agreeing for themselves for and in respect of their own acts and deeds only, and the said Shrewsbury and Birmingham Railway Company covenanting and agreeing for themselves for and in respect of their

own acts and deeds only, and not the one contracting party for the acts and deeds of the other contracting party, — 1st. That the said Shropshire Union Railways and Canal Company or the London and North Western Railway Company shall and will from time to time, and at all times hereafter during the continuance of any such lease authorized to be granted by the said Act make and keep a separate and distinct account of all passengers, cattle, luggage, goods, and other matters and things which such companies or either of them shall carry or convey from Shrewsbury or Wellington, or from any other point between these two places, to Rugby or to any place to the south of or on the London side of Rugby on the line of the London and North Western Railway Company, and also of all passengers, cattle, luggage, goods, and other matters and things which such companies or either of them shall carry or convey from Rugby or from any place to the south of or on the London side of Rugby on the line of the London and North Western Railway Company, to Wellington or Shrewsbury, or to any point between these two last-named places, and also a like separate and distinct account of all sum and sums of money * which such last-mentioned companies or either of * 333 them shall receive for the carriage or conveyance of all passengers, cattle, luggage, goods, and other matters and things whatsoever of or respecting which they are to keep such separate and distinct accounts as aforesaid. And the said Shrewsbury and Birmingham Railway Company shall and will in like manner and during the like period make and keep a separate and distinct account of all passengers, cattle, luggage, goods, and other matters and things which such last-mentioned company shall convey or carry from Shrewsbury or Wellington, or from any point between these two places, to Rugby or any place to the south of or on the London side of Rugby upon the line of the said London and North Western Railway Company or to London, either upon the said last-mentioned line or upon that of any other company, and a like, separate, and distinct account of all sum and sums of money which the said Shrewsbury and Birmingham Railway Company shall receive for the carriage or conveyance of such passengers, cattle, luggage, goods, and other matters and things of or respecting which they are to keep such separate and distinct accounts as aforesaid. 2d. That the said Shropshire Union Railways and Canal Company or the said London and North Western Railway Company on the

one part, and the said Shrewsbury and Birmingham Railway Company on the other part, shall respectively from time to time make out and supply to the other of them a half-yearly account in abstract of all the matters mentioned and comprised in the said first article or clause, which accounts shall be subject to be audited by the respective auditors for the time being of the said hereby contracting companies, and all the accounts mentioned in the said article or clause shall be open at all reasonable times to the inspection

* 334 of the directors of either of the said * contracting companies or of any persons duly authorized by them, and it shall from time to time be ascertained and determined by the auditors of the said contracting companies how much of the moneys by such accounts appearing to have been received shall have been received for and in respect of the distance from Shrewsbury or Wellington or from any point between those two places to Stafford or Wolverhampton, or from Stafford or Wolverhampton to Shrewsbury or Wellington, or to any point between those two places, and such sum when so ascertained shall be divided between the said Shropshire Union Railways and Canal Company and London and North Western Railway Company as one party, and the said Shrewsbury and Birmingham Railway Company as the other party, in the following proportions, that is to say, six-thirteenth equal parts to the Shropshire Union Railways and Canal Company and the London and North Western Railway Company, and the remaining seven-thirteenth equal parts to the Shrewsbury and Birmingham Railway Company, those proportions being considered as substantially corresponding with the relative lengths of the line of the Shropshire Union Railways and Canal Company from Wellington to Stafford, and the line of the Shrewsbury and Birmingham Railway Company from Wellington to Wolverhampton. 3d. That during the continuance of any such lease as aforesaid the said Shropshire Union Railways and Canal Company and London and North Western Railway Company, or either of them, shall not nor will convey or carry any passengers, cattle, luggage, goods, or other matters or things from Shrewsbury or Wellington or from any point between those two places to any point or place on the line of the Shrewsbury and Birmingham Railway or the Birmingham, Wolverhampton, and Stour Valley Railway, or use the line

* 335 of the * Shropshire Union Railway by Gnosall or Stafford, to compete for any traffic which properly belongs to the

Shrewsbury and Birmingham Company. 4th. That the agreement hereby come to shall not in any manner be evaded or eluded by either of the contracting parties, nor shall any arrangement, scheme, device, or contrivance be resorted to or attempted for that purpose, and in case any attempt shall be made by either of the contracting parties to evade or elude the arrangement hereby made, or in case any question or dispute shall arise between the contracting parties on the import or construction of these articles or any matter herein contained, the same shall be referred at the request of either of the said companies to the arbitration and determination of Robert Stephenson, Esquire, and in case of the death or absence of the said Robert Stephenson, then to the arbitration and determination of an umpire to be appointed by the railway commissioners or other government board intrusted with the supervision of railways, in case of the said parties hereto their successors or assigns not agreeing in the nomination of such umpire. 5th. Provided always that notwithstanding any thing hereinbefore contained it shall be lawful for the Shrewsbury and Birmingham Railway Company to determine and put an end to this agreement at any time, by giving six calendar months' notice in writing of such their intention to the Shropshire Union Railways and Canal Company, such notice terminating either on the 30th June or 31st December, whichever of these days shall first happen after the expiration of such six months, and thenceforth this agreement and every clause, matter, and thing herein contained (except in respect of any breach thereof then already committed) shall cease and be at an end.

*The bill also stated, that the plaintiffs' railway from *336 Wellington to Wolverhampton was opened by the plaintiffs for public use on the 13th November, 1849, from which time the plaintiffs had carried passengers and goods to and from Shrewsbury and Wolverhampton by their railway, and to and from Wolverhampton and Birmingham, and also to and from the plaintiffs' station at Wolverhampton and the Wolverhampton station of the London and North Western Railway Company, about one mile distant from the plaintiffs' station, by coaches and omnibuses supplied by the plaintiffs for the purpose. The bill also stated that the plaintiffs had been prepared and were desirous to keep such separate and distinct accounts of traffic on their route as by the articles of agreement it was stipulated they should keep, and that

the plaintiffs well hoped that the defendants would in like manner have kept such separate and distinct accounts, and would have co-operated with the plaintiffs in so doing, as by the articles of agreement they had agreed to do, and would also, from the time when the plaintiffs opened their railway, have abstained from conveying any passengers, cattle, luggage, goods, or other matters or things, from Shrewsbury or Wellington, or from any point between those places to any point or place in the line of the plaintiffs' Shrewsbury and Birmingham Railway, or the Birmingham, Wolverhampton, and Stour Valley Railway, or using the line of the Shropshire Union Railway by Gnosall or Stafford, to compete for any traffic which properly belonged to the plaintiffs, but that with the view to deprive the plaintiffs of the benefit of the articles of agreement, they had wholly neglected and failed and still neglected and failed to keep such separate and distinct accounts of traffic by their

line of railway from Shrewsbury to Rugby and southward * 337 towards London, *via* Stafford, and *vice versa*, as were * provided for by such articles of agreement, and that they had carried and continued to carry passengers, cattle, luggage, goods, and other matters and things from Shrewsbury and Wellington to Wolverhampton and Birmingham, *via* Stafford and Portobello, and *vice versa*, contrary to such agreement, and that they were carrying such passengers at such rates of fare as to prevent the plaintiffs in any way from competing with them.

The bill then charged that the defendants ought to keep such separate and distinct accounts as were mentioned and provided for in the articles of agreement, and ought not to carry any passengers, goods, or other matters, from Shrewsbury or Wellington or from any point between those two places to Wolverhampton or Birmingham, but that the defendants alleged that no lease of the undertaking of the Shropshire Union Railways and Canal Company had yet been granted to them, and that they pretended that such articles of agreement would not come into operation until such lease had been granted; whereas the plaintiffs charged the contrary, and that even if such lease had not then been granted, such articles nevertheless had come into operation, for that the line of railway from Shrewsbury to Stafford had long been completed, and that the same had been and then was used and worked by the London and North Western Railway Company, upon the terms mentioned in the Act of Parliament whereby such lease was directed

to be granted, and that the defendants sometimes pretended that the articles of agreement had not then come into operation by reason that the line of railway between Wolverhampton and Birmingham, and the connection between Portobello and the plaintiffs' station at Wolverhampton had not then been made; whereas the plaintiffs charged the contrary, and that it had been and was the duty of * the defendants to make and complete such line * 338 of railway and connection, and that they might and ought long since to have made and completed the same. The bill prayed that the articles of agreement might be specifically performed, and for an injunction.

Mr. Roll, Mr. Malins, and Mr. Hardy, in support of the appeal. — The plaintiffs complain of two positive breaches of the agreement, first, the non-completion of the line connecting their railway with Birmingham, and, secondly, the neglect of the defendants to keep the separate accounts. It was contended before the Vice-Chancellor that this agreement was a fraud on Parliament, that it was beyond the powers of the companies, and that the time has not yet arrived for its being acted upon, because the whole of the lines authorized to be made by the Shropshire Union Railways and Canal Company are not completed. As to the fraud on Parliament, if there was any, it cannot apply to the plaintiffs, who were not before Parliament except to oppose the Leasing Act; and the defendants are alone responsible for withholding the information. We submit, however, that there is no fraud in keeping such an agreement secret: *Simpson v. Lord Howden*. (a) As to its being beyond the powers of the companies so to contract, there is no statutory prohibition, nor is it like the case of directors employing the capital of a company in an undertaking not warranted by the Act constituting the company, as was the case in *Colman v. The Eastern Counties Railway Company*, (b) and *Cohen v. Wilkinson*. (c) If any part of the contract can be supported, the demurrer ought not to have been allowed. The 87th section of the Railway Clauses Consolidation * Act enables a com- * 339 pany so to contract, for by that section any two or more companies may contract among themselves for a continuous traffic over their respective lines, and there is in fact no difference between

(a) 1 Railway Cases, 326. (b) 10 Beav. 1. (c) *Ante*, Vol. I. p. 481.

such an agreement and one which, like that in the present case, precludes competing traffic. It cannot be contended that there is any thing in the constitution of railway companies which obliges them to become carriers, or that the defendants in this case are compelled by their Acts of Parliament to convey passengers and goods from Shrewsbury to Birmingham, *via* Stafford; and if for the valuable consideration which they have received in the withdrawal of the plaintiffs' opposition to the Leasing Act, they have abandoned the carrying trade by that circuitous route, they cannot be heard in a Court of Equity to set up any such obligation as a ground for not performing their agreement. As to the time not having arrived when the agreement is to take effect, it clearly was not the intention of the parties that the lease was not to be granted until all the Shropshire Union lines were completed; and this will be seen by a reference to the 11th, 19th, 25th, and 31st sections of the Leasing Act. (a) It is also said that the

(a) By the 19th section, it was enacted "that when any one of the said railways shall have been completed before the completion of all such railways, then and in each such case the amount of the share capital which shall have been raised and expended for the formation of such railway shall be ascertained, and thenceforth, until the completion of all the said railways, a rent shall be payable by the London and North Western Railway Company to the Shropshire Union Railways and Canal Company equal to interest after the rate hereinbefore stipulated on the share capital which shall have been so raised and expended for the formation of such completed railway, and on the money, if any, borrowed for such formation, and on the whole of the canal capital of the said Shropshire Union Railways and Canal Company; and when another of the said railways shall be subsequently completed, such rent shall be increased by interest, after the stipulated rates, on the share capital raised and expended, and the money borrowed, if any, for the formation of such other railway," &c.

By the 25th section, it was enacted "that after the lease hereby authorized to be made, and notwithstanding such lease, so much of the canals and works and property connected therewith of the Shropshire Union Railways and Canal Company, or so much of such canals, works, and property as shall not be converted into or used for the purposes of the said railways or any of them shall continue to be managed and worked under the direction of the said joint committee in the name of the Shropshire Union Railways and Canal Company; but all the net profits to be derived from such canals, after defraying the expenses of working and managing the same, shall be added to and accounted as part of the profits of the said undertaking."

By the 31st section it was enacted "that it shall not be lawful for the said Shropshire Union Railways and Canal Company, by virtue of the powers hereinbefore contained, to demise or lease, nor for the said London and North Western Railway Company to enter into or accept such lease of the undertaking of the

line of railway is not * made between Birmingham and * 340 Wolverhampton, and between Wolverhampton and Portobello, but the defendants have by their own acts prevented this being done. *The Great Western Railway Company v. The Birmingham and Oxford Junction Railway Company.* (a) It must be presumed that the defendants would not have obtained their Act but for the withdrawal of the plaintiffs' opposition, and it is well settled by the cases of *Edwards v. The Grand Junction Railway Company*, (b) *Stanley v. The Chester and Birkenhead Railway Company*, (c) * *Greenhalgh v. The Manchester and* * 341 *Birmingham Railway Company*, (d) that effect will be given as against an incorporated railway company to a contract entered into by the projectors of it before the Act was passed, and at a time when the parties to it had not the power to carry it into effect.

Mr. Bethell and Mr. Follett, contra. — It is not competent for bodies constituted as these railway companies are, to form such partnerships as that now sought to be enforced, the effect of which is to throw the aggregate amount of their capitals into one. The agreement is at most only prospective, and cannot enure for the benefit of the London and North Western Railway Company until the whole of the Shropshire Union lines are completed. This is proved by the recitals in the Leasing Act, which show that a lease of the undertaking in perpetuity, and not of any fractional part, is contemplated. To give effect to the agreement will be to divide the profits of the undertaking among others than those for whose benefit the legislature has authorized the creation of the capital, and corporations always receive their property stamped with an obligation not to use it in a manner different from their original trust. There is, therefore, here such a clear violation of the principles on which the defendants' several Acts have been ob-

first-mentioned company, unless it shall be proved to the satisfaction of the commissioners of railways and certified by them under their seal previously to the execution of such lease, that one-half of the whole amount of the capital, exclusive of loans, by the Act or Acts relating to each of the said companies authorized to be raised, has been actually paid up and expended for the purposes authorized by such Act or Acts respectively."

(a) 2 Phil. 597.

(b) 1 M. & C. 650.

(c) 9 Sim. 264; S. C., 3 M. & C. 778.

(d) 9 Sim. 416; S. C., 3 M. & C. 784.

tained, that any one member might restrain such misapplication of their funds. *Colman v. The Eastern Counties Railway*, (a) *Natusch v. Irving*. (b) There was clearly a fraud on Parliament in not communicating the agreement, the effect of * 342 * which is to appropriate the profits of the companies in a manner different from that contemplated by the Companies Clauses Consolidation Act. It has been contended on the other side, on the authority of *The Great Western Railway Company v. The Birmingham and Oxford Junction Railway Company*, (c) that the demurrer must be overruled if any part of the relief asked can be enforced: that case is, however, distinguishable from the present, where an essential part of the contract sought to be enforced is illegal. (They referred to the 86th, 87th, 89th, and 92d sections of the Railway Clauses Consolidation Act.)

Mr. Willcock appeared for the Shropshire Union Railways and Canal Company.

Mr. Malins, in reply, cited *The Bank of Australasia v. The Bank of Australia*. (d)

February 23.

THE LORD CHANCELLOR. — These were demurrers by the London and North Western Railway Company and the Shropshire Union Railways and Canal Company, to a bill filed by the Shrewsbury and Birmingham Railway Company seeking the performance of an agreement entered into between these three companies. The Vice-Chancellor allowed the demurrers upon the ground as he stated that the time was not come at which the plaintiffs had a right to raise the question on that agreement; that is to say, that the time had not arrived when the agreement was to come into operation. Several other grounds, however, were raised on the argument of these demurrers before me, in which it was contended that * 343 * the demurrers might properly be allowed, even if the objection on which the Vice-Chancellor proceeded was not considered as being a sufficient ground for that purpose. It was contended that the agreement was a fraud on Parliament; that the companies had not power to do that which they have agreed to do; and that the agreement was inconsistent with the duty which

(a) 10 Beav. 1.

(b) Gow on Partnership, App. p. 398.

(c) 2 Phil. 597.

(d) 12 Jur. 189.

they owed to the public and to their own subscribers ; in short, that it was an undertaking to do that which they have no right to do, and, therefore, a contract which the Court will not carry into effect.

Now the history of the transactions which led to this agreement was simply this ; and a very short statement will be sufficient to explain the grounds on which my opinion has been formed. The railway which the plaintiffs have made, and which was the foundation of the agreement, was a railway from Shrewsbury to Wolverhampton ; the Shropshire Union Railways and Canal Company had also a railway to make from Shrewsbury to Stafford. The first part of the line, namely, from Shrewsbury to Wellington, is a line common to the two companies : at Wellington, the two lines diverge, the plaintiffs' line proceeding to Wolverhampton, and the line projected by the other company proceeding to Stafford, and there joining the London and North Western Railway. There was also a line existing from Rugby to Birmingham, but there was no continuous railway from Birmingham to Wolverhampton. That had been projected ; and it is sufficient for the present purpose that the London and North Western Railway Company, according to the allegation in the bill, have by a lease, obtained from the parties who had projected that railway, become liable to perfect that railway, and so use it. That was, therefore, by derivation of title from others, part of their property ; and it was part of * the duty which they had undertaken to perform, and * 344 which the bill alleges they might have performed, to complete that line. If that line were completed there would be a continuous railway from Shrewsbury to Rugby, making a shorter line than reaching Rugby from Shrewsbury by Wellington and Stafford. Consequently if other matters were equal, and the fares were in proportion to the distance, there would be a strong inducement to the public going from Shrewsbury to Rugby to proceed by that line of which the plaintiffs' railway formed part, instead of going round by Stafford, which would bring them to the same point after a greater distance and a large curve. The London and North Western Railway Company were desirous of obtaining a lease from the Shropshire Union Railways and Canal Company of several schemes which they had in contemplation, and for which they had obtained their Acts. It must be recollected that the line between Shrewsbury and Wellington was a part of this adventure

and which they had in common with the plaintiffs' railway, and which for that distance was by arrangement made and worked by those two companies in common. The project of the London and North Western Railway Company obtaining a lease of the scheme in progress by the Shropshire Union Railways and Canal Company was opposed, and naturally enough opposed, by the plaintiffs in Parliament, because it was conceived that opening the line from Shrewsbury to Stafford would obviously be a means of carrying passengers and goods from Shrewsbury to Rugby though not by the shortest way, yet by a way which being under the control of so powerful a company as the London and North Western Railway Company would be very likely to interfere with the business of the plaintiffs' railway. It was then agreed that, in consideration

* 345 of their withdrawing their opposition, * and therefore, permitting the London and North Western Railway Company to obtain a bill enabling them to take a lease of the schemes of the Shropshire Union Railways and Canal Company, certain arrangements should be entered into between the respective companies plaintiffs and defendants to the present suit.

The agreement for carrying these arrangements into effect, and the performance of which it is the object of the bill to enforce, recites that a line of railway was in course of formation between Shrewsbury and Wellington in common for the Shrewsbury and Birmingham Railway and the Shropshire Union Railways and Canal Company, and under the direction and control of a joint committee of management. It then recites "that a bill was introduced into Parliament during the last session for authorizing a lease in perpetuity of the undertaking of the said Shropshire Union Railways and Canal Company to the said London and North Western Railway Company, and that the same was opposed by the Shrewsbury and Birmingham Railway Company." It then recites, "that the Shrewsbury and Birmingham Railway Company agreed to withdraw their opposition to the said bill on its being mutually arranged and agreed between the said several companies that the covenants and agreements hereinafter contained should be mutually entered into by them on an Act of Parliament being obtained for authorizing such lease as aforesaid, or a lease between the same parties of any part of the said undertaking" (in a singular number) "between Shrewsbury and Stafford." It then recites the Act which had passed in the last session of Parliament, and then there

come the covenants and agreements to which I shall have occasion presently to refer.

* Now adverting in the first instance to the objection * 346 which was felt by the Vice-Chancellor, and on which he allowed the demurrers, namely, that the Act of Parliament contained provisions in fact for a lease, but that the time had not arrived at which the lease was to be granted, it is to be observed that the Act in question recites three other Acts, being schemes of the Shropshire Union Railways and Canal Company; namely, the 9 & 10 Vict. c. 222, the 9 & 10 Vict. c. 223, and the 9 & 10 Vict. c. 224. Of these Acts, the first and last relate to matters not immediately connected with the arrangement between the plaintiffs and the London and North Western Railway Company, but the Act 9 & 10 Vict. c. 223, being the Act under which the line was to be completed from Shrewsbury to Stafford, does relate to those matters. The question then is, whether a lease was to be granted by the Shropshire Union Railways and Canal Company to the London and North Western Railway Company of any portion of any one of those works before the whole had been completed. The Vice-Chancellor was of opinion that there was no contract between these parties for a lease of any one of these railways, but that the contract was in abeyance until the whole of these works were completed, and then that there was to be a joint lease of the whole, and there being no proof that any one of these three projects had been completed except the one from Shrewsbury to Stafford, he was of opinion that the time had not arrived at which the plaintiffs were entitled to put this contract in force.

Now on looking through this Act of Parliament, though expressions may be found calculated to raise doubts and difficulties, my construction of the Act is (whether the actual lease could or could not be granted is not material), that the rights and liabilities of the * parties arose on each of those railways, as soon as * 347 that particular railway was completed, and that there was no suspension of the right of the lessors or lessees till the whole was completed. It would be indeed a very strange thing if that had been the intention, because the undertakings being totally and entirely distinct, it would be extremely inconvenient to make the obligations attached to each particular railway depend on the completion of another railway which had no connection with it. Now the term used in the Act is "lease," as if there was to be one

lease; and in many parts of the Act it would appear that only one lease was to be made of the whole works. The first section provides, "that on the completion of the works of the railways by the said recited acts authorized to be made so as to be opened for public traffic, or at such earlier period as may be agreed upon between the said companies, the Shropshire Union Railways and Canal Company shall and they are hereby empowered and required to grant, and the London and North Western Railway Company shall and they are hereby empowered and required to accept, a lease in perpetuity of the undertaking" (in the singular number) "of the said Shropshire Union Railways and Canal Company at a rent:" it then proceeds to describe the terms on which they are to be paid on which observations were made which in the view I take of the case I do not think it necessary to notice. There are three distinct works, and a lease of them, in the plural, is proposed to be made "on the completion of the works of the said railways," and then it is to be "a lease in perpetuity of the undertaking." That of itself occurring in the first section of an Act of Parliament is sufficient to raise considerable difficulty in putting a construction on its meaning; but there are subsequent clauses which appear to me to leave no doubt that the rights and liabilities * 348 of the parties were to arise * upon the completion of each of the works, so far as that particular work was concerned. There are several clauses which I do not think it necessary particularly to advert to; but those that are strongest I will shortly state. By the 11th section it is enacted, that, &c. (His Lordship here read the section.)

Now here is a provision which makes the relative situation of landlord and tenant arise as to each railway, upon each railway being completed; and on looking at this section alone, the meaning would be, that, although the actual lease was to be postponed till all the railways were completed, yet that the relative situation of these parties *quoad* the particular railway so finished was to commence on that railway being finished, the directors who were to have the management being directed to conduct the management consistently with the provisions of the Act and of the lease to be granted in pursuance thereof. Whatever effect the provisions of the intended lease were to have with respect to the railway so completed, the London and North Western Railway Company were to have possession of it, and to work it (and if they were

to work it, they were to pay the consideration which they undertook to pay to those from whom they took it), and the terms of the contract are, that this shall be done consistently with the provisions of the lease to be granted. It is obvious either that there was to be or might be a separate lease for that particular railway, or that the whole works were intended to be comprised in one lease. But be that as it may, whether the lease was to be granted immediately, or postponed till the whole works were effected, the London and North Western Railway Company were to have the possession and working of the completed railway. The relative position, therefore, of landlord and tenant was clearly and distinctly * established : whether the lease was executed or * 349 not, could not in this Court make the slightest difference. Then there are several other sections, which it is scarcely worth commenting on ; they were mentioned in the course of the argument, but they all tend to the same construction. (His Lordship here read the 31st section.)

The result therefore of the Act appears to me to be that there was no postponement of the rights of the parties to the benefit of the provisions of the lease until the whole works were completed ; and if there be any doubt at all on the construction of the Act, it would be merely that the lease itself was not to be executed, but that for all beneficial purposes between the parties, it was to come into operation as to each railway, on that particular railway being completed. That being the view I take of the construction of the Act, it would of course dispose of the ground on which the Vice-Chancellor determined this case, because then, it being a fact stated and therefore admitted that that particular line, namely, from Shrewsbury to Stafford, had been completed, the effect is that the intended lease would come into operation as to that line from the moment that that line of railway was opened.

Now the contract made between the plaintiffs and the London and North Western Railway Company, which was in consideration of their not opposing the bill, naturally takes no notice of that part of the leasing power with which the plaintiffs were totally unconnected and had nothing to do, but it does take notice and takes notice only of that portion of the leasing power by which they were to be affected, namely, that which referred to the undertaking between Shrewsbury and Stafford, which was the only line which, if completed, would come * into competi- * 350

tion with the plaintiffs' line. It was for not opposing the bill, *quoad* that line, that this agreement was entered into. The parties confined themselves to that which concerned themselves mutually, and the contract, therefore, never could be supposed to be postponed till a lease was obtained of other lines totally unconnected, and not at all referred to in that contract, but merely of that line which did affect them both, and which is in terms referred to by the contract. The agreement then proceeds to recite, as I before mentioned, the Act of Parliament being obtained to authorize "such lease as aforesaid" (the only lease referred to "as aforesaid" being the lease of the Shrewsbury and Stafford line), "or a lease between the same parties of any part of the said undertaking between Shrewsbury and Stafford," thus using the very words: it is then agreed that the following covenants shall form the consideration for withdrawing the opposition.

The bill having been accordingly passed, the contract is entered into, and the first article of that contract is, &c. (His Lordship here read the article.) The contract in effect was, that, inasmuch as there then would be two lines which might be competing, and give rise to a struggle for custom, the one carrying passengers from Shrewsbury or Wellington to Rugby by Stafford, and the other being from Shrewsbury or Wellington by Birmingham to Rugby, both companies, being anxious to avoid that which might be mutually injurious, entered into an agreement that accounts should be kept of the traffic, so that there should be no struggle about going by one or the other line; but that accounts should be kept of the through traffic which might pass by the one line or the other, and then, having ascertained what that traffic had been and how it had travelled upon each of these lines, the

* 351 profits arising from such * traffic should be divided in certain proportions; namely, seven-thirteenths to one company, and six-thirteenths to the other. This agreement is objected to on the ground of its being adverse to the intentions of Parliament, and inconsistent with the duties which the directors of the two companies or one of them owed to the public and their constituents.

Now the London and North Western Railway Company had the means, to a certain extent, of bringing passengers down to Wolverhampton or Birmingham, not by means of the plaintiffs' line, but by means of another line coming down to Portobello, very near to

Wolverhampton, and going into Birmingham: they had the means of depositing passengers and goods on the line between Wellington and Rugby: that was not through traffic, but it was a carrying of persons who were desirous of travelling on part of the distance covered by these two lines. The contract is that with regard to the through traffic there shall be two accounts taken, and there is a prohibition of the London and North Western Railway Company from carrying passengers and goods, and depositing them on any portion of the plaintiffs' line. Now although the plaintiffs' line terminated at Wolverhampton, yet as the line from Wolverhampton to Birmingham, though not completed, was in progress, and the line from Birmingham to Rugby was completed, the plaintiffs ultimately looked for a clear open line from Wellington to Rugby. If, then, there had not been a provision against it, the London and North Western Railway Company might have considerably interfered with the plaintiffs' traffic on their proper line. It would, indeed, have been a considerable deviation from the shortest line, to carry passengers and goods from Wellington up to Gnosall or Stafford and then down again to Wolverhampton and Birmingham, and such a plan * might or might not have succeeded; but it was a danger, at least, which the plaintiffs were anxious to guard against, and therefore provisions were introduced into the agreement prohibiting the London and North Western Railway Company from doing that which might be so injurious to the plaintiffs' line.

Having disposed of the ground on which the Vice-Chancellor allowed these demurrers, I will advert to the other objections which were referred to in the argument before me. The first was, that the agreement here sought to be enforced was a fraud on Parliament. I cannot, however, see how that can be the case. The Leasing Act being a matter in progress before Parliament, and the arrangement in question being only a consideration for withdrawing the opposition of the plaintiffs to the bill, it cannot be said that there was any fraud, or that the parties could not come to such a private arrangement between themselves. The opposition to a bill must be supposed to be for the purpose of guarding the particular interest of the parties opposing. If these objects are attained by any private arrangement, it is no fraud on Parliament. Every land-owner with whom an arrangement is made before parties go to Parliament, has his opposition to the bill

neutralized or destroyed or withdrawn, in consideration of that arrangement. Therefore, so far as the agreement relates to the particular transaction then in progress, namely the Leasing Bill, it does not appear to me to be any violation of any duty which the parties then owed to Parliament.

Still it may be contended, that it was a breach of contract with the Parliament which passed the earlier Acts. This brings me to the question of the through traffic, which applies as well to * 353 the objection made of the * arrangement being inconsistent with the duties which the parties owed to Parliament, as to any supposed illegality arising from a breach of duty towards their constituents or the public. Now the plaintiffs having a railway, which it was their duty to protect for the benefit of their constituents, had a very natural fear that they might be very much injured by so powerful a company as the London and North Western Railway Company having a line in competition with theirs, though not in point of distance so convenient. Their duty to their subscribers was as far as possible to secure by all lawful means the most traffic they could get. They were apprehensive that they should lose their traffic; and, under these circumstances, they entered into an arrangement with the London and North Western Railway Company, by which the two companies agreed not to compete with each other, but having ascertained how many passengers had gone by their respective railways, then to divide the profits arising from that travelling in certain proportions between them.

This must have appeared to them, as it does to me, a beneficial arrangement for the minor company; it was no violation of duty by the directors, and there is nothing in it of which the subscribers can complain. Now, if this is so, and if the time has arrived at which the contract is to come into operation, the difficulty will be to find any objection to its legality. The other part of the contract is that the London and North Western Railway Company shall not carry passengers from Shrewsbury to Gnosall, or to Stafford, there being from Stafford a line actually existing, and from Gnosall a line in contemplation, which might bring passengers down to Wolverhampton or Birmingham. Though it would be a great *détour*, and the passengers would have to traverse a * 354 much greater extent of line than if * they went from Wellington to Wolverhampton direct, still they might do it, and

therefore the contract provides against it. I see no illegality in this. It does not interfere with the direct traffic, but only with that indirect traffic which could be resorted to merely for the purpose of depriving the plaintiffs of that which they anticipated would be the natural result of the line they had established. The defendants, the London and North Western Railway Company, being under no obligation to carry passengers in the way objected to, it is quite obvious there can be nothing illegal in making an arrangement with another company by which they abstain from exercising their power to do so.

Then it is said, that there is another objection; namely, that the agreement was come to in contemplation of the line being continuous and open from Wellington to Rugby. No doubt that is so, and until the line is entirely open the contract will operate nearly altogether for the benefit of the plaintiffs; and the reason of this is, that until the line is entirely open, any traffic from Wellington to Rugby, which the plaintiffs must have reckoned upon, would be very much interfered with. If the plaintiffs reckoned upon the line being opened, then, as they supplied the railway of part of the distance, they would, of course, partake of the benefit of the traffic; but there is at present a break, and therefore no means of passengers going by railway on the direct line from Wellington to Birmingham, although there are means of getting on to that line by going to Portobello, a station not far from Wolverhampton. The plaintiffs' line runs into Wolverhampton, and when the line from Wolverhampton to Birmingham is completed there will be a continuous line from Wellington to Rugby, that being, of course, that which the plaintiffs reckoned upon when they commenced their proceedings to make the line, and when they entered * into this arrangement with the London and North West- * 355
ern Railway Company. It appears that the parties have made no provision for the present state of things; they have not said that the contract shall not take place until the line is completed from Wolverhampton to Birmingham, and for a very good reason, because if it is not completed it is not the fault of the plaintiffs, but of the defendants, who have the control over that line. They have undertaken that line, and it was their duty to complete it; and they cannot now say that, because they have not completed it, the contract shall not commence or be in opera-

tion until they have performed their duty. That is obviously an argument which cannot for a moment be maintained.

It appears to me, therefore, that this is an attempt to exclude the plaintiffs from the benefit of their contract, after having obtained a consideration which cannot be returned; for it is impossible to restore the parties to the situation they were in before the contract was entered into, because the Leasing Act has passed, and has now become the law of the land. The defendants have established a competing line upon certain considerations specified, and which are not objectionable; for, according to my view of the case, there was nothing illegal or improper in the contract on the part of either of the companies.

If any thing were wanting to bring the case within the latter part of the third clause of the agreement; namely, that the defendants shall do nothing to the prejudice of the traffic "which properly belongs" to the plaintiffs' railway, the bill alleges that the defendants have actually so lowered their tolls as to charge a smaller sum for the longer distance from Shrewsbury or
 * 356 Wellington to Wolverhampton and Birmingham * and *vice versa*, than they charge for the shorter distances from Shrewsbury or Wellington to Stafford, and Birmingham or Wolverhampton to Stafford. This is done for the purpose of bringing on the defendants' line passengers who would otherwise travel on that of the plaintiffs', and consequently it must necessarily interfere, from the lowness of the tolls, with the traffic that might otherwise flow on the plaintiffs' line. This shows, therefore, a studied and intentional injury inflicted on the plaintiffs to the prejudice of the contract which the defendants have entered into, and done obviously for the purpose of destroying the minor company, and increasing the defendants' own profits: it falls, therefore, most distinctly within the prohibition of the contract that the parties have entered into.

I have thus disposed of all the objections which were made on the part of the defendants; and it appears to me to be perfectly well established that the defendants have acted in direct violation of the contract. The bill also alleges that the defendants have not kept the accounts which, according to the agreement, it was their duty to keep. I think, therefore, that whatever may become of this cause at the hearing, there is, upon the allegations contained

in the bill, a clear case upon which the demurrers must be overruled.

Mr. Bethell then asked that, as the construction of the agreement was a legal question, the defendants might have the opportunity of taking the opinion of a Court of Law.

THE LORD CHANCELLOR. — I think the proper time for doing that is at the hearing of the cause. I have decided these demurrers upon the facts which appear upon the face of the bill.¹

¹ An order was afterwards obtained in this case from the Vice-Chancellor of England for an injunction to restrain the defendants from violating the articles of agreement; the defendants (having put in their answer) moved, before Lord Chancellor TRURO, to dissolve the injunction. His Lordship dissolved the injunction, leaving the plaintiffs at liberty to bring such action as they might be advised. 8 M'N. & G. 70. An action of covenant was afterwards brought in the Court of Queen's Bench; the fifth breach assigned was that the defendants "did evade and elude the covenants and agreements, and each of them in the indenture contained;" and to this breach the defendants, after oyer, demurred generally. The Court pronounced judgment for the plaintiffs, holding that the agreement was not illegal or a fraud on the legislature. 17 Q. B. 652. Another motion for an injunction was then made, but it stood over till the hearing of the cause. The Master of the Rolls, on the hearing, thought that Lord COTTENHAM must be taken as having inferentially decided that the contract was not *ultra vires*; but his Honor held that it had no operation till all the lines had been finished. 16 Beav. 441. The case then came on appeal before the Lords Justices, who held that the contract was *ultra vires* and ought not to be specifically performed; that if valid it would come into operation, although only a portion of the projected lines had been completed; that the directors of a railway company are trustees of their statutory powers, and that an agreement entered into by them on behalf of the company, amounting to a breach of trust, could not be enforced to the prejudice of the shareholders. 4 De G., M. & G. 115. An appeal against that decree was taken to the House of Lords, who affirmed the decree with costs. 6 H. L. 113.

- * 357 * In the Matter of The WILTS, SOMERSET, and WEYMOUTH Railway Act, 1845, and of The LANDS CLAUSES CONSOLIDATION ACT, 1845.

In re CHARLES BERJEW FOOKS.¹

1849. December 20, 21.

The owner of certain land required by a railway company, on being served with the usual notice, stated his desire to have the amount to be paid to him for compensation and damages settled by arbitration under the provisions of the Lands Clauses Consolidation Act, 1845. Arbitrators were accordingly appointed by the land-owner and the company, and, these arbitrators not being able to agree upon an umpire, an umpire was ultimately appointed by the commissioners of railways. In the mean time, the company having paid into the bank the amount claimed by the land-owner and having given the bond required in such cases by the Act, entered upon the land. The arbitrators not having made their award in time, the questions of compensation and damage came before the umpire, who made his award giving the land-owner a much less sum than that claimed by him from the company. The land-owner having refused to deliver an abstract of title or to take any steps for conveying the land, the company proceeded under the provisions of the Act applicable to such a case and paid into the bank the sum awarded by the umpire. They then presented a petition for payment out to them of the sum paid in by them before taking possession of the land. The land-owner in the mean time had taken proceedings at law to set aside the award on various grounds but without success, and was at the time when the petition was presented prosecuting an action against the company to recover the amount originally claimed by him. Under these circumstances the land-owner opposed the petition of the company; but the Lord Chancellor made the order prayed, holding that the land-owner was not entitled to avail himself of the security provided by the Act in the deposit of the money, and at the same time to repudiate the proceeding, the benefit of the result of which it was the object of the Act thus to secure to him.

THIS was an appeal by C. B. Fooks against an order made by the Vice-Chancellor of England on the 28th July, 1849, in accordance with the prayer of a petition presented in this matter by the Wilts, Somerset, and Weymouth Railway Company, under the following circumstances.

C. B. Fooks was the owner of certain lands at Melcombe Regis in the county of Dorset called The Park, which the company were authorized to take for the purposes of their railway.

- * 358 * Having received the usual notices that these lands

¹ S. C., 5 Hare, 199.

were required by the company, and that they were willing to treat for the purchase of them and as to compensation for damage, C. B. Fooks, on the 13th May, 1848, served the following notice on the company: Whereas I have been served with a notice from you, the said Wilts, Somerset, and Weymouth Railway Company, stating that the promoters of the Wilts, Somerset, and Weymouth Railway would, at the expiration of not less than ten days from the service of that notice, issue their warrant under their common seal to the sheriff of the county of Dorset, requiring him to summon a jury for the purpose of determining by their verdict the amount of compensation to be paid by the promoters of the undertaking for my interest in certain lands, hereditaments, and premises therein referred to and thereunder mentioned, or for any damage that might be sustained by me by reason of the execution of the said works: I do, therefore, hereby give you notice that I desire to have my claim for compensation in respect of the said lands, hereditaments, and premises, and damages, settled by arbitration under and in pursuance of the provisions in that behalf contained in the Lands Clauses Consolidation Act, 1845, and I do signify such desire by this notice in writing to you the promoters of the said undertaking; and I do hereby, according to the provisions of the said statute in that behalf contained, state to you the nature of my interest in respect of which I claim compensation and the amount of such compensation, that is to say, the lands, hereditaments, and premises for and in respect of which I claim compensation consist of a portion of land called The Park, situate at Melcombe Regis in the county of Dorset and numbered 2 in the map or plan deposited in the office of the clerk of the peace for the said county of Dorset. And I do * hereby give you notice that I am * 359 possessed of the said lands, hereditaments, and premises for all the unexpired residue and remainder of a certain term of seventy-five years from the 25th day of December in the year of our Lord 1835, subject to the annual rent of 2*l.*, and I am also equitably entitled to the fee-simple of the said lands, hereditaments, and premises subject to the said lease, and I am well and sufficiently entitled to sell and dispose of the legal fee-simple of and in the said lands, hereditaments, and premises; and I claim as a compensation for the said estate and interest of and in the said lands, hereditaments, and premises so vested in me and also which I am so entitled to sell and dispose of, the sum of 5860*l.*, and also as a

further compensation for the damages that may be sustained by me by reason of the execution of the works, the further sum of 2875*l.*”

Upon the receipt of this notice, the company, on the 23d May, 1848, appointed Mr. Giles as their arbitrator, and on the 10th June, 1848, C. B. Fooks appointed Mr. Dixon as his arbitrator. The company, however, being desirous of entering on the lands before the amount of the purchase and compensation money could be settled, on the 24th June, 1848, paid 8435*l.*, being the purchase-money and compensation claimed by C. B. Fooks in his notice of the 13th May, 1848, into the bank to the credit of an account, “*Ex parte* the Wilts, Somerset, and Weymouth Railway Company, the account of Charles Berjew Fooks.” The company also gave to C. B. Fooks a bond dated the 24th June, 1848, under the seal of the company and under the hands and seals of two sureties, in the penal sum of 8435*l.* conditioned to be void if the company or their successors should pay to C. B. Fooks, or should deposit

* 360 in the Bank of England for the benefit of the * parties interested in the land, as the case might require, under the provisions contained in the Land Clauses Consolidation Act, 1845, all such purchase-money or compensation as might, in the manner provided in the Lands Clauses Consolidation Act, 1845, be determined to be payable by the company in respect of the land, together with interest thereon, at the rate of 5*l.* per cent per annum, from the time of the company entering upon the land until such purchase-money or compensation should be paid or deposited. The company then entered upon the land.

The arbitrators being unable to agree upon an umpire within the time prescribed by the Lands Clauses Consolidation Act, applied, on the 21st June, 1848, to the commissioners of railways, requesting them to appoint an umpire in pursuance of the provisions of the Act; and, on the 23d June, 1848, the commissioners appointed George Powell as umpire, before whom (the arbitrators having failed to make their award within the time prescribed by the Act) the matters in question duly came. The umpire made his award on the 25th August, 1848, and thereby awarded 1735*l.* as the sum to be paid by the company to C. B. Fooks, by way of compensation and consideration money for the absolute purchase of the fee-simple and inheritance in possession of the lands in question and also as compensation for damage by reason of severance or otherwise.

C. B. Fooks having, when applied to, refused to furnish an abstract of his title to the land, the solicitors of the company, on the 15th May, 1848, served him with the following notice: "On behalf of the Wilts, Somerset, and Weymouth Railway Company, and under and by virtue of the provisions contained in the Lands Clauses Consolidation Act, 1845, we hereby require you to make *out and show to the said company or to us, their * 361 solicitors, a title to the lands and hereditaments specified and described in the award of Mr. George Powell dated the 25th August, 1848, and delineated in the map or plan annexed to and made part of the said award, for or in respect of which the sum of 1785*l.* has been thereby adjudged and awarded to be paid by the said company to you the above-named Charles Berjew Fooks, for purchase-money and compensation. We also require you, on behalf of the said company, to convey or release the said lands and hereditaments to the said company: and we give you notice that, if within ten days from the date hereof you shall fail to deliver to us, as the solicitors for the said company, an abstract of your title to the said lands and hereditaments, the said company will, at the expiration of that time, consider you as having failed to make out such a title, and as having refused to convey or release the said lands and hereditaments, and will proceed to take such other measures consequent thereon as are authorized and directed by the said Lands Clauses Consolidation Act, 1845."

C. B. Fooks having paid no attention to this notice, the company, on the 28th May, 1849, paid the sum of 1785*l.* into the bank to the credit of an account, "*Ex parte* the Wilts, Somerset, and Weymouth Railway Company, the account of Charles Berjew Fooks, in respect of certain lands situate within the town of Weymouth and the parish of Melcombe Regis in the said county of Dorset," and executed a deed poll under the seal of the company, dated the 30th May, 1849, by which it was witnessed that, in pursuance and consideration of the power for that purpose by the Lands Clauses Consolidation Act, 1845, given to or conferred upon and *vested in the company, the company, with the intent to * 362 vest in themselves and their successors and assigns absolutely the fee-simple and inheritance of and in the said lands free from incumbrances, did, by the deed poll so executed by and under the common seal of the company and stamped with the stamp duty which would have been payable upon a conveyance to

them of the said hereditaments, declare that the company had purchased and taken the land and other hereditaments therein particularly described and delineated in the plan indorsed on the deed poll, and all the appurtenances thereto belonging or in anywise appertaining.

In Michaelmas term, 1848, C. B. Fooks, having made the submission to arbitration a rule of her Majesty's Court of Exchequer of Pleas, obtained a rule to show cause why the award of the umpire should not be set aside. The case came on before the Court in Easter term, 1849, when C. B. Fooks contended that the award was bad on the following grounds: first, that the appointment of the umpire had not been made under the seal of the commissioners, but only by a letter communicating to the parties the fact of his appointment; and, secondly, that the award did not settle the amount payable in respect of costs. The Court, however, discharged the rule, intimating, at the same time, that they might have had some difficulty in enforcing the award upon an application for an attachment, but stating that they left C. B. Fooks to his remedy by action of trespass or ejectment or any other proceeding which he might be advised to take. C. B. Fooks accordingly gave the company notice under the 68th section of the Lands Clauses Consolidation Act, 1845, requiring them to summon a jury; and the company having failed to comply with this request, he commenced an action against them for the sum of 8435*l*.

* 363 * being the amount so claimed by him as hereinbefore mentioned.

Under these circumstances and while this action was pending, the company in July, 1849, presented a petition which, after setting forth the Acts by which the company was incorporated, and the 76th, 77th, 85th, 86th, and 87th sections of the Lands Clauses Consolidation Act, 1845, (a) together with the facts

(a) Section 76. "If the owner of any such lands purchased or taken by the promoters of the undertaking, or of any interest therein, on tender of the purchase-money or compensation either agreed or awarded to be paid in respect thereof, refuse to accept the same, or neglect or fail to make out a title to such lands, or to the interest therein claimed by him, to the satisfaction of the promoters of the undertaking, or if he refuse to convey or release such lands as directed by the promoters of the undertaking, or if any such owner be absent from the kingdom, or cannot after diligent inquiry be found, or fail to appear on the inquiry before a jury, as herein provided for, it shall be lawful for the promoters of the undertaking to deposit the purchase-money or compensation payable

* above mentioned, stated that 80*l.* 6*s.* 8*d.* was payable to * 364 C. B. Fooks for interest in respect of the 1735*l.*, but that

in respect of such lands, or any interest therein, in the bank, in the name and with the privy of the Accountant-General of the Court of Chancery in England or the Court of Exchequer in Ireland, to be placed, except in the cases herein otherwise provided for, to his account there, to the credit of the parties interested in such lands (describing them so far as the promoters of the undertaking can do), subject to the control and disposition of the said Court."

Section 77. "Upon any such deposits of money as last aforesaid being made the cashier of the bank shall give to the promoters of the undertaking, or to the party paying in such money by their direction, a receipt for such money, specifying therein for what and for whose use (described as aforesaid) the same shall have been received, and in respect of what purchase the same shall have been paid in; and it shall be lawful for the promoters of the undertaking, if they think fit, to execute a deed poll under their common seal if they be a corporation, or if they be not a corporation under the hands and seals of the said promoters, or any two of them, containing a description of the lands in respect whereof such deposit shall have been made, and declaring the circumstances under which and the names of the parties to whose credit such deposit shall have been made, and such deed poll shall be stamped with the stamp duty which would have been payable upon a conveyance to the promoters of the undertaking of the lands described therein; and thereupon all the estate and interest in such lands of the parties for whose use and in respect whereof such purchase-money or compensation shall have been deposited shall vest absolutely in the promoters of the undertaking, and as against such parties they shall be entitled to immediate possession of such lands."

Section 85. "Provided also, that if the promoters of the undertaking shall be desirous of entering upon and using any such lands before an agreement shall have been come to or an award made, or verdict given for the purchase-money or compensation to be paid by them in respect of such lands, it shall be lawful for the promoters of the undertaking to deposit in the bank by way of security, as hereinafter mentioned, either the amount of purchase-money or compensation claimed by any party interested in or entitled to sell and convey such lands, and who shall not consent to such entry, or such a sum as shall, by a surveyor appointed by two justices in the manner hereinbefore provided in the case of parties who cannot be found, be determined to be the value of such lands, or of the interest therein which such party is entitled to or enabled to sell and convey, and also to give to such party a bond, under the common seal of the promoters if they be a corporation, or if they be not a corporation under the hands and seals of the said promoters, or any two of them, with two sufficient sureties to be approved of by two justices in case the parties differ, in a penal sum equal to the sum so to be deposited, conditioned for payment to such party, or for deposit in the bank for the benefit of the parties interested in such lands, as the case may require, under the provisions herein contained, of all such purchase-money or compensation, as may in manner hereinbefore provided be determined to be payable by the promoters of the undertaking in respect of the lands so entered upon, together with interest thereon, at the rate of five pounds per

* 365 the company were advised that they could * not safely pay the same to him in consequence of certain claims and other matters in the petition set forth. The petition then prayed in effect that a sum of 80*l.* 6*s.* 8*d.*, part of the sum of 8435*l.*, * 366 might be transferred * and paid from the account of the said sum of 8435*l.* to the account of the said sum of 1785*l.*; and that the residue of the sum of 8435*l.* might be paid to the company. This petition was opposed by C. B. Fooks on the ground that the award was invalid, and that the money paid into Court ought not to be parted with until the question as to the validity of the award was decided. The Vice-Chancellor, however, made an order ac-

centum per annum, from the time of entering on such lands, until such purchase-money or compensation shall be paid to such party, or deposited in the bank for the benefit of the parties interested in such lands, under the provisions herein contained; and upon such deposit by way of security being made as aforesaid, and such bond being delivered or tendered to such non-consenting party as aforesaid, it shall be lawful for the promoters of the undertaking to enter upon and use such lands, without having first paid or deposited the purchase-money or compensation in other cases required to be paid or deposited by them before entering upon any lands to be taken by them under the provisions of this or the special Act."

Section 86. "The money so to be deposited as last aforesaid shall be paid into the bank in the name and with the privity of the Accountant-General of the Court of Chancery in England or the Court of Exchequer in Ireland, to be placed to his account there to the credit of the parties interested in or entitled to sell and convey the lands so to be entered upon, and who shall not have consented to such entry, subject to the control and disposition of the said Court; and, upon such deposit being made, the cashier of the bank shall give to the promoters of the undertaking, or to the party paying in such money by their direction, a receipt for such money, specifying therein for what purpose and to whose credit the same shall have been paid in."

Section 87. "The money so deposited as last aforesaid shall remain in the bank, by way of security* to the parties whose lands shall so have been entered upon for the performance of the condition of the bond to be given by the promoters of the undertaking, as hereinbefore mentioned, and the same may, on the application by petition of the promoters of the undertaking, be ordered to be invested in bank annuities or government securities, and accumulated; and, upon the condition of such bond being fully performed, it shall be lawful for the Court of Chancery in England, or the Court of Exchequer in Ireland, upon a like application, to order the money so deposited, or the funds in which the same shall have been invested, together with the accumulation thereof, to be repaid or transferred to the promoters of the undertaking, or, if such condition shall not be fully performed, it shall be lawful for the said Court to order the same to be applied in such manner as it shall think fit for the benefit of the parties for whose security the same shall so have been deposited."

according to the prayer of the petition; and from this order C. B. Fooks now appealed to the Lord Chancellor.

Mr. Roll and *Mr. Hare*, for C. B. Fooks, and in support of the appeal, insisted that the Vice-Chancellor before making the order complained of ought to have decided the question as to the validity of the award; that neither any thing done by C. B. Fooks nor the decision of the Court of Exchequer prevented the question being now raised. They submitted that the appointment of G. Powell as umpire was bad, there having been neither a sealing nor a signature of the appointment by the commissioners within the 4th section of the Act 9 & 10 Vict. c. 105; that the 20th section of the Act 3 & 4 Vict. c. 97, providing that "all notices, appointments, requisitions, certificates, or other documents in writing signed by one of the secretaries of the said committee or by some officer appointed for that purpose by the Lords of the said committee, and purporting to be made by the Lords of the said committee, shall for the purposes of this Act be deemed to have been made by the Lords of the said committee," and the 19th section of the Act 5 & 6 Vict. c. 55, and the 23d section of the Act 7 & 8 Vict. c. 85, dispensing with proof of the authority of the person signing, had reference only to notices, &c., under those particular Acts, and did not apply to the present case. * They contended also that the * 367 award was bad because it did not specify how the costs were to be paid, the costs of the arbitration being by the 67th section of the Lands Clauses Consolidation Act placed at the discretion of the arbitrators: *Quick v. The London and North Western Railway Company*; (a) that by the 87th section of the Lands Clause Consolidation Act the money paid into Court by the company is to remain for the benefit of the land-owner who has thereby a sort of equitable estate in the money given to him. The cases of *Davis v. Getty* (b) and *Heming v. Swinnerton* (c) were referred to.

Mr. Bethell and *Mr. Osborne*, contra.—*Mr. Fooks* has deliberately repudiated all right depending on the fact of the company having paid the money into Court, and has taken proceedings under the 68th section of the Act, besides bringing an action. It is, therefore, imperative on the Court to order the money to be paid out to the company. As to the validity of the award the

(a) 18 Law J., Q. B. 89; 13 Jur. 408.

(b) 1 S. & S. 411.

(c) 5 Hare, 350.

jurisdiction over an award belongs to that Court of which it is made a rule; *Heming v. Swinnerton*; (a) and the same reason which induced the Court of Exchequer to decline setting aside the award will operate here. It is clear that C. B. Fooks cannot be heard to question the validity of the appointment of the umpire, after having treated him as umpire. In the case of *Harcourt v. Ramsbottom*, (b) Lord ELDON, speaking of an arbitrator under similar circumstances, says, "both parties treating him as arbitrator, it is impossible to contend that either of them had not admitted that he had authority to act." Assuming, how-
 * 368 ever, that the *question could be raised in the Exchequer, yet it cannot be entertained in this Court which is the depository of the money. As to the costs, the Act does not provide for the case of an umpire, the 34th section applying only to arbitrators, and being merely directory. The umpire has no express authority by the reference to deal with the question of costs.

[THE LORD CHANCELLOR. — The 31st section says that all the matters referred to the arbitrators shall be determined by the umpire.]

It is to be observed that by the 37th section no award is to be set aside for mere error in form. This Court, if it had any control to exercise over the money, would hesitate to exercise it under the circumstances of this case, and especially when the award satisfies the condition of the bond under the 85th section of the Act.

Mr. Roll, in reply.

THE LORD CHANCELLOR. — If, after what has passed in the Court of Exchequer, I found that I could not deal with this matter without having a decision upon the points which were raised before that Court, I should certainly think it necessary to direct some course to be taken by which the opinion of a Court of Common Law might be obtained upon them. It does not, however, appear to me that the party who here resists the payment of the money out of Court has put himself in a position to have the double

(a) 2 Phil. 79.

(b) 1 J. & W. 505.

remedy of a security for the money deposited, and at the same time to repudiate the whole proceedings. It has been contended on his behalf that the money deposited is so deposited, not only for the purpose of securing * what might be found due * 369 as the value of the land taken, but also for that which the party may recover in the action which he has subsequently brought. I cannot, however, assent to this. The Lands Clauses Consolidation Act provides that the company may take possession of land, and, if they do not agree as to the value, it prescribes some preliminary modes by which that value is to be ascertained, not finally ascertained but an estimated value, in order to secure to the party who owns the land and who is to part with it a means by which he may ultimately be paid what may be found due. There are two modes prescribed: one is by a reference to arbitration, and the other by the verdict of a jury. Then comes a provision, that unless the company be willing to pay the amount of compensation claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of notice from the party entitled, the same shall be settled by arbitration in the manner therein provided; or if the party so entitled desire to have the question of compensation settled by a jury, it shall be lawful for him to give notice in writing of such his desire to the promoters of the undertaking, stating the particulars therein pointed out; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed and enter into a written agreement for that purpose, they shall within twenty-one days after the receipt of such notice issue their warrant to the sheriff to summon a jury for settling the same in the manner therein provided, and in default thereof they shall be liable to pay to the party so entitled the amount of compensation so claimed, and the same may be recovered in an action.

In the present case the proceedings under the reference took place, and the sum of 1735*l.* was awarded * as the * 370 amount which the party whose property had been taken was entitled to receive. Two objections are then raised totally unconnected with the merits of the case (a party is, however, always entitled to take such objections as he thinks right), one being that there was not sufficient accuracy in describing the authority of the party who appointed the umpire, and the other as to the amount and taxation of the costs. The Court of Ex-

chequer were of opinion that there was so much doubt on the construction of the Act of Parliament as to induce them not to entertain the questions thus raised on a motion to set aside the award, though they at the same time said that their judgment was not conclusive and that they did not mean it to be conclusive. It is, however, beyond all doubt a strong circumstance in the case that they did not see their way to set aside the award, for if they had entertained a decided opinion against the award, it was obviously their duty to have set it aside.

Now, assuming that it may be open to the party to take some other course of proceeding to have the validity of the award tried, the question is, whether, upon an application by the company to have the 8435*l.* paid out of Court, there is sufficient ground stated on the part of the land-owner to induce me to refuse the application. I must say that, although I have had before me many cases in which companies have been guilty of oppression against individuals, by using the strong powers conferred upon them by Parliament, this is a case of quite an opposite character, for if the land-owner succeeded in this, it would be inflicting a great injury on the body with whom he is dealing, because he has not only got the 8435*l.* deposited, but also the 1735*l.* awarded as the value of the land; and it having been ascertained, so far as the

* 371 proceedings have gone, that * the land in question is only worth 1735*l.*, he now endeavours to get rid of the reference, and to obtain the compensation which he originally claimed; namely, the 8435*l.* Although, of course, he has a right to all the privileges which the Act gives him, yet this is not a case in which he is entitled to any particular indulgence from the course he has thought proper to pursue.

The application is now made by the company for the payment of the money out of Court, on the ground that the award has ascertained the value of the land to be 1735*l.*, which is paid into Court independently of the 8435*l.* Now the 8435*l.* is only paid into Court under the provisions of the 85th section of the Act as a deposit by way of security and to answer the condition of the bond, which is for all such purchase-money or compensation as may in manner therein provided be determined to be payable by the company in respect of the lands entered upon together with interest thereon, at the rate of 5*l.* per cent from the time of entering. The provisions referred to are for the purpose of ascertaining the

value of the land either by a reference to arbitration, or by the verdict of a jury, not a jury in an action brought for the purpose of repudiating the whole reference, but a jury summoned under the provisions of the Act for the purpose of assessing the value of the land taken. Therefore the party here who has brought such an action is not only not entitled to any assistance as to the mode of bringing it, but I think has parted with his right over the money deposited. He cannot be allowed to say that the 8435*l.* is in Court for a purpose which he entirely repudiates, and that, at the same time, he will endeavour to get that sum from the company by some other mode of proceeding, although the amount awarded to him, and in respect of which the sum in Court is a security, is only 1735*l.*

* I have not seen any note of the Vice-Chancellor's judgment to know whether this is the ground on which he proceeded; but it appears to me that the order appealed from is right, and that it is so independently of the question raised before the Court of Exchequer. The land-owner is entitled to take any proceedings which he may be advised; but I do not think that the claim now set up by him, that the money deposited shall be retained until the result of such proceedings, is founded in justice.

HOWKINS v. JACKSON.

1850. January 26, 28, 30.

W. H. was entitled for life to the interest of certain residuary estate to the principal of which the wife of A. J. was entitled absolutely. W. H. being largely indebted to A. J., executed an indenture assigning to A. J. all his, W. H.'s, interest in the said residuary estate. It was subsequently discovered that the residuary estate consisted partly of a fund the existence of which was unknown to either of the parties at the time of the execution of the indenture. W. H. thereupon filed a bill which, not complaining that the indenture had been executed by fraud, sought to exclude from its operation the additional fund by treating the indenture merely as a security for the amount then due from W. H. The Lord Chancellor, however, dismissed the bill, holding that the words of the indenture were sufficient to pass the interest of W. H. in the fund in question, and that no case was made on the pleadings for reforming the instrument.

THE general object of this suit was to obtain a declaration that a certain deed bearing date the 11th November, 1839, purporting

to be an absolute assignment of the property therein mentioned. was only a mortgage of such property to secure advances made by the assignee. The circumstances of the case were shortly as follow :

Robert Gibson the elder, by his will dated the 25th February, 1820, gave to trustees a sum of 7000*l.* three per cent Consolidated

Bank Annuities, upon trust to pay the dividends thereof to

* 373 his daughter Anne Gibson * during her life ; and after her

death, in trust as to the capital for her child or children,

and, if more than one, equally between them. The testator then,

after giving certain legacies, directed, in effect, that the residue of

his estate should be divided into three parts, one of which three

parts he gave upon the same or the like trusts as were before

declared of the 7000*l.* three per cent Consolidated Bank Annuities

in favour of his daughter Anne Gibson and her children.

R. Gibson died in 1823, at which time his daughter Anne, who

had married T. Hearsey (who died in 1822), was a widow, having

one child, a daughter, Anne Gibson Hearsey. In 1830 Anne Hear-

sey, the widow, intermarried with William Howkins, and died in

1839, leaving her husband, W. Howkins, who took out administra-

tion to her estate and effects, and her daughter Anne Gibson

Hearsey, her surviving.

In February, 1839, Anne Gibson Hearsey married Alfred Jack-

son, the defendant in the present suit. Upon occasion of this

marriage a settlement was executed, by which a sum of 7010*l.*

three per cent Consolidated Bank Annuities, part of a sum of

12,589*l.* 1*s.* 7*d.* like annuities, described as property to which A. G.

Hearsey was or was considered to be entitled as the only child of

Anne Hearsey under the will of the testator R. Gibson, was settled

as a provision for A. G. Hearsey and her husband and the children

of the marriage ; and it was agreed that the residue of the sum of

12,589*l.* 1*s.* 7*d.* said annuities, and all other interest, vested con-

tingent and reversionary, of A. G. Hearsey under the will of R.

Gibson in his residuary estate and effects, should become the ab-

solute property of A. Jackson. It subsequently appeared that a

portion of the property mentioned in the settlement, and

* 374 which * was therein treated as capital, consisted partly of

interest which had accrued on portions of the residuary

estate of the testator R. Gibson during the life of Anne Howkins.

To this interest, William Howkins, as administrator of his wife,

claimed to be entitled.

In 1889 A. Jackson paid various sums of money in discharge of the debts of W. Howkins, who was involved in pecuniary difficulties. It appeared that A. Jackson admitted his liability to account to W. Howkins in respect of the sums received by him under the trusts of the marriage settlement which consisted of income as hereinbefore mentioned ; but that he claimed the right to set them off against the sums advanced by him to W. Howkins. It was under these circumstances, and it not being apparently expected by the parties that there would be any thing coming from the estate of R. Gibson which W. Howkins could be entitled to receive, that the following indenture, about which the question in the suit arose, was executed.

The indenture, which bore date the 11th November, 1889, was made between W. Howkins of the one part, and Alfred Jackson of the other part. It recited the will of R. Gibson, the marriage settlement of A. Jackson, and the error in the accounts rendered by the executors, in treating the interest and income of the testator's estate as capital. It recited also that considerable sums (specifying them) were still due to the estate of the testator in India, which had been and were carrying interest ; that W. Howkins, as administrator of his late wife, would be entitled to such interest as had accrued during her lifetime ; that A. Jackson, relying that he would be entitled under his marriage settlement to the whole of the residue of the sum of 12,589*l.* 1*s.* 7*d.* three per cent Consolidated Bank Annuities, after *deducting *375 the 7010*l.* like annuities, had paid debts of W. Howkins to the amount of nearly 2000*l.* ; that neither W. Howkins nor A. Jackson, at the time of making the settlement, had any knowledge that any part of the sum of 12,589*l.* 1*s.* 7*d.* Consols consisted of interest or rent, or that any part of the future remittances from India would belong to W. Howkins in right of his late wife ; that W. Howkins, taking all the aforesaid circumstances into consideration, and especially that A. Jackson had paid his debts to the amount aforesaid, was minded and desirous, and had proposed and agreed, to give up and absolutely assign and make over to the said A. Jackson, for his own use and benefit, all stocks, funds, bank annuities, rupees, dividends, interest, rents, profits, and moneys, principal and interest, rights, claims, and demands whatsoever, to which he, W. Howkins, in his marital right or as such administrator as aforesaid or otherwise then had or could claim, set up, or be entitled

to in respect of the estate and effects of the said testator under or by virtue of his will, and also to give A. Jackson the general release thereafter contained. The indenture witnessed, that in consideration of the premises, and more particularly the said A. Jackson having, as aforesaid, paid and satisfied the debts of the said W. Howkins to the amount of 2000*l.*, W. Howkins assigned to A. Jackson all and every the stocks, funds, bank annuities, rupees, dividends, interest, rents, profits, and sum and sums of money, principal and interest, and rights, claims, and demands whatsoever at law and in equity or otherwise, which he, W. Howkins, either in his marital right or as administrator of his late wife, then had or could or might claim, set up, pretend, demand, or be in any manner entitled to, from, out of, or upon all or any of the estate and effects

of the testator R. Gibson under and by virtue of his said * 376 will, and the proceeds, gains, profits, and income thereof * or otherwise produced thereby or therefrom or in any manner relative thereto, and particularly in, to, from, out of, or upon all and every the stocks and funds or bank annuities thereinbefore mentioned, and the dividends, interest, and annual proceeds thereof, and the debts or moneys, principal or interest, then remaining due and uncollected in India, England, or elsewhere, and the rents remaining due and uncollected and thereafter to be or which ought to be remitted to England, and all or any other the property, estate, or effects late of the said testator R. Gibson, to hold the same to the said A. Jackson, his executors, administrators, and assigns to and for his and their own absolute use and benefit, with the usual powers to sue for and receive the same in the name of W. Howkins. The indenture contained a covenant against incumbrances and for further assurance, and mutual general releases.

In the year 1842, it was discovered that a sum of 12,000*l.*, which in 1825 had been received by Robert Gibson, the son and executor of the testator, had not been accounted for by him. Robert Gibson the younger at once acknowledged his liability, and offered to pay down part of what was due by him, and to give security for the remainder. William Howkins claimed, notwithstanding the deed of the 11th November, 1839, to be entitled to such part of the debt due by R. Gibson the younger as his, William Howkins's, wife would have been entitled to in respect of interest under the will of the testator.

Various negotiations, which however were not ultimately carried

into effect, took place between the parties relative to this claim, into the details of which it is not necessary to enter; but their general object was to obtain that the deed of the 11th November, 1839, * should be treated simply as a security * 377 to A. Jackson for the sums advanced by him to W. Howkins. W. Howkins died on the 18th June, 1846, having appointed William Howkins and William Codner, the plaintiffs in the present suit, his executors.

The bill was filed on the 10th May, 1847, and, after stating the facts to the effect above mentioned, prayed a declaration that the sums due from Robert Gibson the younger, in respect of accumulations of interest and income, were not intended to be assigned, and were not assigned, to the said A. Jackson by the indenture of the 11th November, 1839, and that that indenture and the premises therein comprised were a security merely to A. Jackson for the balance of what might be found due to him from W. Howkins on the result of the dealings between them; and that A. Jackson might be declared a trustee of any surplus or residue of the premises comprised in such indenture, after the satisfaction of any such balance; and that the necessary accounts, for ascertaining such balance and the sums received by A. Jackson for such interest, might be taken. The defendant put in his answer on the 15th July, 1847, and thereby insisted that the indenture of the 11th November, 1839, was intended to be an absolute sale of all that was due or owing to W. Howkins, or that might have been recovered or claimed by him as administrator of his wife, out of the outstanding estate of the testator, and was never intended to be in the nature of a mortgage or security to the defendant for the advances which he had made.

The cause came on before the Vice-Chancellor KNIGHT BRUCE, on the 15th February, 1849, when his Honor made a decree, declaring that the share of William Howkins in right of his wife Anne Howkins in the * arrears of interest, was * 378 not intended to pass, and that the beneficial interest therein did not in equity pass, by the indenture in question, and that the plaintiffs were in equity entitled to the same, notwithstanding such indenture; and directing the consequent reference to the Master; and declaring also that there were to be no costs on either side up to the time of the decree; but reserving the consideration of all further

directions and subsequent costs. From this decree, the defendant now appealed to the Lord Chancellor.

Mr. J. Russell and *Mr. H. W. Cole*, for the plaintiffs, submitted that the case resolved itself into one of evidence of intention; that the parties being entirely ignorant of the existence of the sum of 12,000*l.*, it was impossible to suppose that they could have intended to include it in the deed; that the general words were to be looked at in reference to the subject-matter of the instrument. They cited and commented on *Butcher v. Butcher*, (a) *Simons v. Johnson*, (b) *Cole v. Gibson*, (c) *Ramsden v. Hyllton*, (d) *The Marquis of Exeter v. The Marchioness of Exeter*, (e) *Lindo v. Lindo*, (g) *Solly v. Forbes*. (h)

[On *Mr. H. W. Cole* proposing to read a document purporting to be instructions for the indenture in question,—

Mr. Bethell, on behalf of the defendant, objected on the ground that the bill was not for reforming the instrument, but for construing it.

* 379 THE LORD CHANCELLOR. — The pleadings and the * argument in this case proceed on the ground that the deed affords evidence of the meaning of the parties. It is sought to be proved (and this is the strength of the plaintiffs' case), that the large general words only describe particular property, but can it be said that, when the word "all" is used, it is not to mean "all," because something not in the contemplation of the parties becomes thereby included? If it was said that the evidence showed that the deed in question did not rightly express the intention of the parties, a case might be made for asking to have it reformed; but this is not the view presented. The instructions are, therefore, immaterial to the point in issue. (i)]

(a) 1 Bos. & Pul. 113.

(e) 3 M. & C. 321.

(b) 3 B. & Ad. 175.

(g) 1 Beav. 496.

(c) 1 Ves. 508.

(h) 2 Brod. & B. 38.

(d) 2 Ves. 304.

(i) In consequence of the above intimation of the opinion of the Lord Chancellor, the reading of the instructions was not pressed.

Mr. Bethell, Mr. Bacon, and Mr. Shadwell, for the defendant. — The Vice-Chancellor would, on the construction of the indenture, have dismissed the bill ; but his Honor deemed it right to refer to the instructions, and he cut down the indenture to the instructions. The bill, however, contains no reference to the instructions, although they are, somewhat unnecessarily perhaps, referred to in the defendant's answer. The only point that the bill makes is, that the deed is a mortgage and not an assignment. We submit that under these circumstances, the Vice-Chancellor could not properly refer to the instructions at all, and that, if he could, they do not bear out the use made of them. The indenture and the instructions point clearly to a dealing with an unascertained quantity ; namely, all the interest of Mrs. Howkins under the will of the testator. Nothing can be more mischievous than to try to cut down the operation of a deed, by reference to an instrument * not referred to in the deed. *Beaumont v. Bramley*. (a) The authorities cited on the other side only show that, in the case of releases, the Court will cut down the operation of a deed to the recitals.

Mr. H. W. Cole, in reply. — If all property, both known and unknown, was intended to be included in the indenture in question, the introduction of the recital which it contains, referring to specific funds, was useless. The general recital cannot do away with the conclusion to be drawn from the particular recitals. In *Beaumont v. Bramley*, (a) the existence of the property omitted was known to both parties, which materially distinguishes it from the present case.

THE LORD CHANCELLOR. — As the bill is framed in this case, it appears to me impossible to support the decree of the Court below. The bill does not seek to correct the indenture of the 11th November, 1839, but to have a decree that the property assigned was only assigned as a security. That, however, was not the case made before the Vice-Chancellor, before whom the only question was as to the title of W. Howkins to the income of one-third of certain property in which his wife was interested under the will of the testator in the suit. Now the decree appealed from assumes that he was entitled, and declares that the amount of such income was

(a) Turn. & R. 41.

not intended to pass by the deed. But the bill does not complain that the deed was executed or obtained by fraud, or present any grounds which would enable this Court to set aside the transactions. Reference was made to observations of Lord ELDON, * 381 to the effect * that the Court will seldom interfere to rectify a deed except in those cases where the instrument affects by its recital to carry out an agreement, and by its operative part clearly goes beyond that recital. Such, however, is not the object of the present suit; and no relief is prayed founded upon any attempt to correct the deed. The transaction took place between W. Howkins and A. Jackson, and was grounded upon the rights of the former in the estate of the testator, and derived under his will. The fact of the sum of 12,000*l.*, part of the assets, having been received by the executor and not accounted for by him, was unknown to both parties; and the question is, whether the interest of W. Howkins in that sum passed by the deed. It is only necessary for this purpose to look at the instrument itself.

His Lordship here read the recitals, and the operative part of the indenture, and remarking, in reference to the latter, on the largeness of the words used, "all and every the stocks," observed, that to say that they did not include all the estate which they described was to say that no words could have such an effect. His Lordship then added,—

It may be true that the parties did not know of the property in question, and, therefore, that in one sense it may be said not to be included; but there was no want of intention to deal with every thing by the deed, but only a lack of knowledge as to the existence of the particular fund. As the bill, however, makes no case of the deed being obtained under circumstances that give the party a right to recall it, I have nothing to do on the present occasion but to look at the deed itself. Doing this for the purpose of seeing whether the property in question passed, I entertain no doubt but that it did pass. If the point raised had been, that * 382 * what the words of the deed imported was not the real intention of the parties, or that there were circumstances calling on the Court to rectify the instrument, the case might have been different; but all that the bill asks is the construction of the indenture, founded on the fact of the parties not knowing of the existence of the sum in question. Under these circumstances the bill ought, therefore, to have been dismissed with costs.

LOADER v. CLARKE.

1850. February 5.

A woman a few days before her marriage and without the knowledge of her intended husband transferred a sum of stock to trustees upon a parol trust, as alleged by the trustees, for her separate use for life, and after her death for the benefit of her children. The fact of this transfer became known to the husband some time after the marriage. The dividends were received by the wife from the date of the marriage until her death, which took place seventeen years after. After her death the husband filed a bill, praying a transfer of the stock, and containing a statement that the dividends were duly paid to the wife during the coverture. *Held*, under the circumstances, that the husband was precluded from asserting his claim to the stock as having been transferred in fraud of his marital right.

THIS was an appeal from the decree of the Vice-Chancellor WIGRAM, bearing date the 9th February, 1849, dismissing the plaintiff's bill.

The bill was filed on the 7th June, 1847, by Joseph Thomas Loader against Richard Frederick Clarke the elder, and Richard Frederick Clarke the younger, and the four infant children of the plaintiff, and stated that Margaret Sophia Loader, the late wife of the plaintiff, was previously to her marriage with the plaintiff absolutely entitled to a sum of 250*l.* in the three per cent reduced annuities, and which sum was, until the transfer therein mentioned, standing invested in her the said M. S. Loader's then name of M. S. Clarke solely, in * the books of the governor and * 383 company of the Bank of England. The bill then stated that in the month of October, 1827, the plaintiff and the said M. S. Loader intermarried, and that a day or two previously to such marriage the said M. S. Loader, without the knowledge or privity of the plaintiff and under the advice of her father and brother, the said R. F. Clarke the elder and R. F. Clarke the younger, transferred the said sum of 250*l.* three per cent reduced annuities into, and the same was then standing in, the names of the said R. F. Clarke the elder, R. F. Clarke the younger, and the said M. S. Loader by her then name of M. S. Clarke in the said books; that the plaintiff did not discover that such sum of stock had been so invested until some considerable time after the marriage. The bill then stated that it was alleged by the defendants,

and the plaintiff believed and admitted the fact to be, that all the dividends which accrued due upon the said sum of 250*l.* three per cent reduced annuities during the lifetime of the said M. S. Loader, were duly paid to her during her lifetime; that she died on or about the 20th February, 1844; that the plaintiff had taken out administration to her under the circumstances thereafter mentioned; that the defendants pretended that the plaintiff's wife had made a valid parol declaration of trust of the stock in question for her separate use for life, and after her death for her children: and, after negativing such pretences, the bill prayed a transfer of the stock to the plaintiff as administrator of his wife.

The defendants (the Clarkes), by their answer, stated that when the sum of 250*l.* three per cent reduced annuities was so first transferred into the joint names of the defendants and M. S. Clarke, she the said M. S. Clarke stated to the defendant R. F.

Clarke the elder that she, M. S. Clarke, wished, and the * 384 defendants * believed, that it was the intention of the said

M. S. Clarke at the time of such transfer and also afterwards up to the time of her decease, that the dividends on the said sum should be paid to her the said M. S. Clarke during her life for her separate use, and that in case the plaintiff died in her lifetime the sum of stock should be re-transferred into her own sole name, but that if she should happen to die in the lifetime of the plaintiff, leaving any child or children, then that they, the defendants, should retain the sum of stock until such child or children should attain the age of twenty-one years, and then that the same sum of 250*l.* three per cent reduced annuities, should be divided equally among such children or be transferred to such only child; and they also stated that since June, 1844, when the proposed transfer to the plaintiff (the particulars as to which are hereinafter stated) was about to have been made, they had been advised by counsel that they could not safely make such transfer.

The following facts appeared in evidence, or were admitted by the solicitors on both sides. On the 20th April, 1844, being soon after the death of the plaintiff's wife, the plaintiff's solicitor wrote to the defendant R. F. Clarke the elder, asserting his right to the stock with the accumulations. In answer to this letter, a proposal was made by the solicitor of the defendants that the plaintiff should consent to have the stock settled on himself for life, with remainder to his children. This proposal was refused on the part

of the plaintiff. After some further communication between the solicitors of the plaintiff and the defendants (the Clarkes), it was agreed that the stock should be transferred to the plaintiff on his obtaining administration to his wife and giving an indemnity; and the following is an extract from a letter which appeared to * have passed from the solicitor of the defendants to the * 385 solicitor of the plaintiff: "Mrs. Loader before her marriage received a legacy of 150*l.* with which and other moneys she had saved she bought 250*l.* three per cent reduced annuities in her own name, and four or five days before her marriage she transferred such stock into the names of herself, father, and brother, for the purpose, as she states, of preserving it for any children she might have. I am desirous, and I assure you Mr. Clarke is also, to save Mr. Loader every possible expense, but I cannot dispense with the administration, though I think I may with the release on Mr. Loader giving a proper acknowledgment of the transfer of the stock and a receipt in full of all demands relating thereto. If you think I shall be safe in this mode of dealing, I shall be satisfied." On the first June, 1844, the plaintiff obtained letters of administration to his wife, and on the 15th June, the solicitor of the defendants wrote, appointing an early day for the transfer of the stock to the plaintiff. The plaintiff however did not attend at the time and place appointed, and from that time until May, 1847, he took no steps whatever for enforcing his claim. On the 18th of May, 1847, the plaintiff's solicitor revived the claim; and, on that occasion and for the first time the defendant, R. F. Clarke the younger, informed the plaintiff's solicitor that he would not consent to a transfer of the stock. On the 31st May, however, the defendants (the Clarkes) offered to transfer the stock into the joint names of the plaintiff's children and his late wife, but this offer was rejected.

The plaintiff then, on the 7th June, 1847, filed his original bill in this suit; and having subsequently ascertained that the defendants had sold the stock, he, on the 9th July, 1847, filed a supplemental bill, stating the sale of the stock, and praying that the defendants * might be decreed to pay him the amount * 386 of the moneys produced by such sale, or to re-transfer the amount, whichever would be most for the plaintiff's benefit.

The Vice-Chancellor having dismissed the bill as against the defendants (the Clarkes) without costs, and as against the infant

defendants with costs, the plaintiff now appealed to the Lord Chancellor. There was some little discrepancy in the evidence of the witnesses examined by the defendants, as to the ultimate trusts so alleged to have been declared of the stock as before mentioned.

The Solicitor-General and *Mr. W. M. James*, for the plaintiff, in support of the appeal. — Assuming that there had been a declaration of trust by the plaintiff's wife, yet the transfer by her of the stock, having taken place, pending the treaty of marriage, and having been concealed from her intended husband whose interests were thereby intended to be excluded, was in the contemplation of a Court of Equity a fraud on his marital rights, and cannot be supported. *Goddard v. Snow*, (a) *England v. Downs*. (b) The mere fact that the plaintiff did not in the lifetime of his wife claim the dividends cannot make any difference, though it must be admitted that if he had been aware of the circumstances of the transfer before his marriage he could not afterwards set it aside. *St. George v. Wake*. (c) It was contended in the Court below by the defendants, that the passage in the bill, stating that the dividends had been duly received by the plaintiff's wife in her lifetime, afforded presumptive evidence of the plaintiff's knowledge, but that statement is founded on the communication made * 387 * by the defendant, R. F. Clarke, the elder, after the death of the wife, and not upon any previous knowledge of the plaintiff. The case of *De Manneville v. Crompton* (d) was relied upon by the Vice-Chancellor, but it is clearly distinguishable from the present. [They also referred to *Taylor v. Pugh*. (e)]

Mr. Malins and *Mr. Eddis*, for the infant defendants.

Mr. Wood and *Mr. Hallett*, for the defendants, the Clarkes.

THE LORD CHANCELLOR (without calling upon the respondents), after observing that it was quite clear that if the fact of the transfer had been kept secret from the plaintiff, and if during all the time of his marriage he had known nothing of the circumstances connected with the transfer or of the payment to his wife of the

(a) 1 Russ. 485.

(d) 1 V. & B. 354.

(b) 2 Beav. 522.

(e) 1 Hare, 608.

(c) 1 M. & K. 610.

dividends, a case of fraud on his marital rights would have been established,¹ proceeded to the following effect :—

Such, however, is not the case put by the bill, nor attempted to be made out by the evidence. The claim is made to rest on the ignorance of the plaintiff before the marriage, and is not asserted until seventeen years after that event. The bill merely states that the plaintiff did not discover that the stock in question had been so invested until a considerable time after the marriage; and then it states, as a fact, the receipt by the wife of all the dividends which had accrued upon the stock, and which the plaintiff not only did not interfere with her receiving, but allowed her to receive. The statement in the bill is that the dividends * were * 388 duly paid to the wife during the coverture, and that allegation must be taken most strongly against the pleader. If at any time after the marriage the plaintiff knew the fact of the investment, he must also be held to have known the nature of the trusts; and if he did not assert the claim which he now seeks to enforce, he has clearly waived any right he might ever have had, and cannot now be permitted to set up his title to the stock as transferred in fraud of his marital rights.

His Lordship then referred to the evidence which had been adduced, and observed that all the witnesses were speaking of a transaction which occurred in 1827, and that the lapse of so long a time sufficiently accounted for the trifling discrepancy in their evidence with respect to the ultimate trusts of the stock, but that all the witnesses concurred as to the main parts of the trust; namely, for the separate use of the wife, and, after her death, for the benefit of her children. His Lordship then added,—

With regard to the costs, although the Vice-Chancellor may have entertained some doubts upon the case, and, consequently, dismissed the bill as against the defendants, the Clarkes, without costs, yet, as the plaintiff has, in my opinion, wholly failed to make out a case of fraud on his marital right, I think this appeal must be dismissed, with costs.

¹ 1 Story Eq. Jur. § 273; 2 Kent (11th ed.), 174, 175; *Fletcher v. Ashley*, 6 Grattan, 332; *Tucker v. Andrews*, 13 Maine, 124, 128; *Williams v. Carle*, 2 Stockt. (N. J.) 543; *Spencer v. Spencer*, 3 Jones Eq. 404; *Belt v. Ferguson*, 3 Grant, 289; *Waller v. Armistead*, 2 Leigh, 11; *Manes v. Durant*, 2 Rich. Eq. 404; *McAfee v. Ferguson*, 9 B. Mon. 475; *Cheshire v. Payne*, 16 B. Mon. 618; *O'Neill v. Cole*, 4 Md. Ch. Dec. 107; *Jordan v. Black, Meigs* (Tenn.), 142; *Logan v. Simmons*, 3 Ired. Eq. 487; *Ramsay v. Joyce*, 1 McMullan Eq. 236.

*389 *BAGSHAW v. The EASTERN UNION Railway Company.¹

1850. February 5, 9.

A railway company having power under separate Acts of Parliament to make and purchase certain branch railways in connection with their main line, were for those purposes respectively authorized to raise the requisite capital by the creation of new stock. Having issued scrip certificates accordingly, but being about to apply the money subscribed in respect thereof to the prosecution of works on their original line, a holder of such scrip filed his bill on behalf of himself and all other the proprietors of such scrip against the company and its directors, praying an injunction to restrain the company and the directors from employing any money which had been subscribed in respect of the new stock towards the completion of the original line, or otherwise than in the completion of the works for which the money was subscribed. *Held*, overruling demurrers of the company and directors for want of equity and want of parties: First, that upon the construction of the Acts of Parliament creating the new stock, the capital raised by the scrip was not to be considered as identical with or part of the original capital of the company, and that the holders of the scrip had a clear equity to keep the company in the application of the money raised to those purposes for which it was advanced.² Secondly, that the plaintiff, as owner of such scrip had a right in that character to file his bill clear of any objection to which such bill might have been open had he merely been a member of the company. Thirdly, that a holder of scrip by purchase is invested with all the rights of the original subscriber.

THIS was an appeal by the defendants, the Eastern Union Railway Company and the directors of the company, from an order

¹ S. C., 7 Hare, 114; 13 Jur. 602; 14 Jur. 491; 2 H. & T. 201.

² The principle of this decision has been recognized and the case itself cited with approbation in subsequent cases. See *Shrewsbury Railway Co. v. North-Western Railway Co.*, 6 H. L. 137; 4 De G., M. & G. 115, and cases in note (2); *Eastern Counties Railway Co. v. Hawkes*, 5 H. L. 346; *Hawkes v. Eastern Counties Railway Co.*, 1 De G., M. & G. 737, 759; *Salomons v. Laing*, 12 Beav. 339; *Winch v. The Birkenhead, Lancashire, and Cheshire Railway Co.*, 5 De G. & S. 562; *Beman v. Rufford*, 1 Sim. N. S. 550; 15 Jur. 914; *Simpson v. Denison*, 10 Hare, 51; *Vance v. East Lanc. Railway Co.*, 3 K. & J. 50; *East Anglian Railway Co. v. Eastern Counties Railway Co.*, 11 C. B. 775; 21 L. J. N. S. C. P. 23; 16 Jur. 249; *Bateman v. Mayor of Ashton*, 3 H. & N. 323; *Taylor v. Chichester & Midhurst Railway Co.*, L. R. 2 Exch. 357; 4 H. & C. 409; *Forrest v. Manchester, S. & L. Railway Co.*, 30 Beav. 40; S. C., 7 Jur. N. S. 887; *Dodge v. Woolsey*, 18 How. (U. S.) 331; 2 Kent (11th ed.), 283, note (5); *Angell & Ames Corp.* (9th ed.) §§ 391, 393; *Sears v. Hotchkiss*, 25 Conn. 171; *Gifford v. New Jersey Railway Co.*, 2 Stockt. (N. J.) 171; *Kean v. Johnson*, 1 Stockt. (N. J.) 401.

of the Vice-Chancellor WIGRAM overruling their several demurrers to the plaintiff's bill. The bill and the facts of the case are so fully set out in the 7th volume of Mr. Hare's Reports, page 114, that the following short summary will be found sufficient to render the judgment of the Lord Chancellor intelligible to the reader.

The Eastern Union Railway Company being by their Acts of Parliament authorized to make railways from Colchester to Ipswich, Ipswich to Bury St. Edmonds and Norwich, and from Ipswich to Harwich, and for these purposes to raise certain definite sums of money, shares, and loans, and being also by a separate Act empowered to purchase and complete the Hadleigh Junction * Railway and for that purpose to raise a sum not * 390 exceeding 100,000*l.* by shares or loan, and having commenced to apply part of the moneys so lastly authorized to be raised in the construction of the Norwich line, the plaintiff, who was a proprietor of scrip certificates for stock forming part of the capital raised in pursuance of the Acts authorizing the company to purchase the Hadleigh Junction Railway and make the Harwich line, filed his bill to restrain such misapplication. The company and the directors demurred for want of equity and want of parties.

Mr. Page Wood and *Mr. W. T. S. Daniel*, for the defendants, in support of the demurrers, contended generally that the company had a right to apply the capital raised under the powers of the two Acts in the manner in which they were doing, and that the Court would not, in a case like the present, interfere with the discretion of the governing body of the company. In support of this view of the case, they referred to the several authorities mentioned in the report of the case by Mr. Hare above referred to, taking also the same objections in respect to parties as those on which they had relied before the Vice-Chancellor.

The Solicitor-General (SIR JOHN ROMILLY) and *Mr. Grove*, in support of the bill.—The diversion of the capital to which the plaintiff has subscribed being illegal, is an act not capable of confirmation, even by the whole of the other members of the company. *Colman v. The Eastern Counties Railway Company*, (a)

Cohen v. Wilkinson. (a) The present case is therefore * 391 distinguishable from *Foss v. Harbottle.* (b) The * Acts of Parliament, by which the new stock was created, were a contract with the legislature to complete the lines thereby authorized, and any attempt on the part of the company to relieve themselves of such an obligation, even by an application to Parliament, would be restrained. *Heathcote v. The North Staffordshire Railway Company,* (c) *The Stockton and Hartlepool Railway Company v. The Leeds and Thirsk and the Clarence Railway Companies.* (d) It is said that the company ought not to have been made a party to this suit, but it is obvious that the company would not be bound unless it were a party in its corporate character. The directors are also necessary parties, being trustees of the whole sum received, and are personally liable for its misapplication. *The Attorney-General v. Wilson.* (e) [They also referred to and commented on the cases of *Lord v. The Governor and Company of Copper Miners,* (g) and *Smith v. Goldsworthy.* (h)]

Mr. Page Wood, in reply. — The plaintiff is in this dilemma, that, if he relies on the special contract and sues as a scrip-owner, he is in opposition to a large body of the shareholders, and, if he sues on behalf of himself and others the scrip-owners as a registered proprietor, he has a common interest with all the other shareholders. The company ought not to have been made defendants, there being no allegation against them in the bill, and as nothing illegal done by the directors could bind them. If there is any fraud, it is just as much against the company as the plaintiff; and there being no allegation that the plaintiff could not obtain the Common Seal, of the company, the demurrer * 392 * of the company ought, therefore, to be allowed. *Mozley v. Alston.* (i)

THE LORD CHANCELLOR. — This is a bill filed by a person calling himself a proprietor of scrip, on behalf of himself and other pro-

(a) Since reported. *Ante*, Vol. I. p. 481.

(b) 2 Hare, 461.

(c) Before the Vice-Chancellor of England, 14 Jur. 73; but reversed by the Lord Chancellor, *ante*, Vol. II. p. 100.

(d) 2 Phil. 666.

(h) 4 Q. B. 430.

(e) Cr. & P. 1.

(i) 1 Phil. 790.

(g) 2 Phil. 740.

prietors of scrip certificates for perpetual 6l. per cent stock, 1849, in the Eastern Union Railway Company, and it prays, among other things, to restrain the company and those individuals who are named as defendants, being directors of the company, from employing any money which has been subscribed by the plaintiff and the other holders of this scrip, towards the carrying on a railway to Colchester, or otherwise than in the completion of the works for which that money was subscribed.

Now the bill is founded, no doubt, upon that equity which I lately considered as properly applied by the Master of the Rolls, in the case of *Cohen v. Wilkinson*, (a) where a company having obtained an Act of Parliament, and procured subscriptions and advances of money, for the purpose of carrying a railway from Epsom to Portsmouth, afterwards finding out that they could not, or not thinking it advisable to, carry on the whole of the line, proposed to make that portion only of the line which was between Epsom and Leatherhead. The Master of the Rolls thought that this was a departure from the purpose for which the money had been raised, and that the company were not at liberty to apply it otherwise than for the purpose of making the whole of the railway. The case came before me, and I was of the same opinion. (b)

The *injunction granted by the Master of the Rolls was *393 very carefully framed for the purpose of not interfering with any thing which would have been a legitimate prosecution of the work, and therefore restrained the company from carrying on the works, or making the railway between Epsom and Leatherhead, otherwise than for the purpose of effecting the whole scheme; but they having abandoned the whole scheme, the injunction of course operated against the carrying on of the works which they intended to complete. The mode, however, in which the injunction was framed, marked the principle on which it was granted; namely, that although it was part of the work, yet not being part of the work for the purpose of effecting the whole, the company ought not to be permitted to go on with it.

The case made by the present bill is this, that whereas a previously existing railway company thought it desirable to effect two branch railways connected with their own, two Acts were passed; the one authorizing the raising a sum of 100,000l. for the purpose

(a) Since reported. 12 Beav. 138.

(b) Since reported. *Ante*, Vol. I. p. 481.

of purchasing a branch railway to Hadleigh, and the other for raising 200,000*l.* for effecting a new and distinct branch from a junction with the Eastern Union Railway to Harwich. Now the directors, or the company, whose agents the directors are, having determined not to carry into operation these two schemes, are applying the money which has been subscribed under these Acts for the purpose of carrying on a portion of the original railway, and completing it to Colchester. That, undoubtedly, raises the same question as was raised in the case to which I have referred; and if the facts stated in the bill are sufficient for that purpose, it must be governed by the same principle.

Now, it seems to me, upon reading this bill, that the facts * 394 stated are sufficient, for it very distinctly * appears that the money was raised for the purpose of particular works, and that those particular works have been entirely abandoned, and that there is an intention of applying the money so raised, for carrying out works totally foreign to the purpose of those who subscribed the money. It is, of course, in vain to speculate on what motives parties might have had in advancing their money: the plaintiff may have had an independent private reason for promoting the making of a railway to Harwich, and those who subscribed the 100,000*l.* may have had some reason for promoting the purchase of the railway to Hadleigh. The question really is, whether the law will permit money advanced for one purpose to be applied, contrary to the wish of the owner of that money, to another, and whether the bill states such a case as brings it within that principle.

The bill, after setting out the earlier Acts constituting the Eastern Union Railway Company, states the passing of the two Acts in question, in the year 1847. That which relates to the making of the branch railway to Harwich recites that it would be attended with much public advantage if a railway were made from the line of the Eastern Union Railway in the parish of Lawford to Harwich, with two small branches therefrom; and, also, if a pier or jetty were made at the latter place in connection with the proposed railway: and then, amongst other things, it enacts that it should be lawful for the Eastern Union Railway Company to raise for the purposes of that Act, in addition to the capital they were authorized to raise under other Acts, and in addition to any other sum which they might be authorized to raise by any Act to be passed

in the then present session of Parliament, any further sum of money, not exceeding in the whole the sum of 200,000*l.*, and that the capital thereby authorized to be raised should be considered as * a part of the general capital of the company, * 395 and should be subject to the same provisions in all respects, whether with reference to the payment of calls or the forfeiture of shares on non-payment of calls or otherwise, as if it had been part of the original capital, except as to the amount of such shares and the times of making calls thereon and the amount of such calls; and that it should not be lawful for the company, out of any money by that Act or any other Act relating to the company authorized to be raised for the purposes of such Act or Acts, to pay or deposit any sum of money which, by any standing order of either house of Parliament then in force or thereafter to be in force, might be required to be deposited in respect of any application to Parliament, for the purpose of obtaining an Act authorizing the company to construct any other railway. Now this provision has been observed upon on both sides. It is said that it makes the capital so to be raised part of the capital of the whole company; but that is not the point at issue, because, although it may for certain purposes be described and considered as part of the capital of the whole company, the question is, whether it was not raised for a special and particular purpose and therefore to be applied to that special and particular purpose, or whether it was not intended to be left to the discretion of the directors to apply it in common with the original capital, for purposes not contemplated by the Act, and for purposes which were not intended to be provided for by the Act. I consider that the meaning of the enactment is, that there should be a sum of money raised for the purpose of the Act, which was to make a railway connecting the Eastern Union Railway with Harwich, and that it is declared to be made part of the capital of the company not with reference to the mode in which it is to be applied, but for the purpose of incorporating * in the * 396 Act all the provisions and regulations comprised in former Acts directing the mode in which the company were to deal with their original capital, and making those directions applicable to the dealing of the company with the additional shares. That provision of the Act which prohibits the directors from making use of the new shares for the purpose of deposit to meet the parliamentary rule in respect to the promoting of any other bill, is also very

strong to show that there was no intention of amalgamating the new shares with the original capital.

Then with respect to the Hadleigh Act, it seems to me to be open to very much the same observation. The bill states that by a previous Act, a company called the Eastern Union and Hadleigh Junction Railway Company were empowered to sell, and the Eastern Union Railway Company were empowered to purchase, the undertaking authorized by the Act of the former company, and that for the purpose of the purchase and the execution of the Eastern Union and Hadleigh Junction Railway, the Eastern Union Railway Company were authorized to create such an additional number of shares, and to borrow such sum of money, as might be necessary for completing such purchase, or for constructing or working the said undertaking, provided the amount to be raised should not exceed the sum of 100,000*l*.

Thus, in both Acts there was a specific purpose entertained, and that purpose was to be met and accomplished by means of the additional stock to be created under the authority of each of those Acts. The bill then contains a statement which undoubtedly is not immaterial, a statement of the report and the resolution * 397 passed at the meeting of the 21st August, 1847, and * which led to the issuing of the scrip certificates of which the plaintiff is a holder. The report is stated as being favourable to both schemes provided for by the Acts; and the resolution is, "That for the purpose of constructing the branch line from Manningtree to Harwich, and for purchasing the Hadleigh Railway under two Acts passed in the last session of Parliament, the directors be authorized to raise between the date hereof and the 1st of January, 1849, the sums of 200,000*l*. and 100,000*l*. and to grant scrip receipts for such amount as may from time to time be paid up in respect of such sums until each subscriber of 20*l*. and upwards shall have paid the amount he may subscribe in full, and such scrip receipts shall entitle the holder thereof on the 1st of January, 1849, to become a registered shareholder in a new Eastern Union Stock for the amount he has subscribed and paid up, upon which he shall receive a guaranteed dividend of 6*l*. per cent per annum in perpetuity, and have the option at the end of any six months within five years of converting his guaranteed stock into the general stock of the company."

Now it is impossible to contend after this that these stocks are

all united, and mixed up with the original capital in one fund: they are in fact as distinct in point of amount, of interest payable, and in point of security, as they possibly can be: they are raised specifically for the purpose of those two Acts, and they bear a different rate of interest, 6*l.* per cent, and they are guaranteed by the original capital. The parties holding these stocks have, therefore, a preference over the holders of the other fund, and, in a particular event, they are to fall into the original stock, a provision which of itself would be quite sufficient to show that they were never considered as being identical with, or part of, the original stock. The resolution is, therefore, not only * important * 398 as constituting part of the contract, but as a representation operating upon the minds of the parties advancing the money and telling them for what purposes the money was to be raised, and in what manner it was to be secured, and what was to be the amount of the benefit to arise from the subscriptions that they were to make.

The bill then states that, in pursuance of the resolution, the whole of the 300,000*l.* was soon subscribed for, and that all the calls thereon had been paid previously to the 2d June, 1848, except the sum of 85,500*l.* which would fall due, and ought to be paid on or before the 30th December, 1848; and, further, that the persons who so subscribed did so confiding in the resolution and in the representations made by the chairman to the meeting, and of the other directors, as to the purposes for which the perpetual 6*l.* per cent stock was to be created, and not supposing that the money to be raised thereby would be applied to any other purposes than those connected with the construction of the line to Harwich, and the purchase of the line from Hadleigh. The bill then goes on to state the certificates, which describing the shares as the "scrip for Eastern Union perpetual 6*l.* per cent stock, 1849," refer to all the Acts of the company, including the Acts of 1847, under which the scrip was raised and the new works carried on; that the plaintiff having become a purchaser of two shares of 250*l.* each, left his certificates for the purpose of being registered; and that they ought to have been registered, but had not been registered.

Then comes the allegation, which is the allegation in the bill upon which the equity turns:—"That from other inquiries which he the plaintiff has since instituted, * he has * 399 ascertained, as the fact is, that the directors of the Eastern

Union Railway Company have resolved not to proceed with the construction of the said railway from Manningtree to Harwich, and, as evidence thereof," &c. ; and then he states evidence, which may or may not be applicable. The allegation however in the bill which must be taken to be true for the present is, "that he has ascertained, as the fact is ;" not that he has received testimony which leads him to believe it is so, but that he has discovered that such is the fact. It is therefore a distinct allegation (which the defendant in demurring admits the fact to be), that the directors have resolved not to carry into effect that railway from the junction to Harwich. The bill then states "that a majority of the directors of the said company have a strong personal interest distinct from the interest of the said company in completing the Eastern Union Railway to the city of Norwich, and are totally indifferent about the completion of the line to Harwich, and that, finding themselves unable to raise sufficient capital for both purposes, they have determined to misapply, and have already to a great extent misapplied, the money raised under the said Eastern Union and Harwich Railway and Pier Act, 1847, and under the said Eastern Union and Hadleigh Junction Railway Sale Act, 1847, by employing the same in constructing an extension line to Norwich, and for other purposes not authorized by the said Acts or either of them." Then the bill states, "that such application is not only contrary to the directions of the said Acts of Parliament, but is also contrary to the said resolution passed at the said meeting on the 21st day of August, 1847, and that it is not within the powers of the said corporation or company, or of any majority of the members thereof, to authorize or sanction such application ;

and that by the Companies Clauses Consolidation Act, the * 400 plaintiff is disabled from * calling a meeting of the said company without giving thirty-five days notice thereof. Then the bill states "that the said directors of the said Eastern Union Railway Company have already received 214,500*l.* or thereabouts, under the powers of the two last-mentioned Acts, and that they have misapplied the said money by employing it on works to which the same is not authorized to be applied by the said Acts, or either of them ; and that unless restrained by the order and injunction of this honourable Court, they will, in like manner, misapply the said sum of 85,500*l.*, which is to be received as hereinbefore mentioned on the 30th day of December, instant."

Now we have here all the allegations of title and of the misapplication of the moneys upon which the question raised on these demurrers depends.

The first question no doubt is upon the construction of the Acts, because, if the bill be wrong on that point, then the allegations would not be material; but being clearly of opinion that the plaintiff is right in his construction, and that those who subscribed for the purposes specified by the Acts have a right to have their money applied to such purposes, and having, upon the authority of the case I have before referred to, no doubt that this Court will enforce such rights, and finding the positive allegation that the company not only intend to misapply the money, that is, apply it for other purposes, but that they have actually done so, I am of opinion that the plaintiff is, in equity, entitled to the interposition of this Court for the purpose of keeping the company, in the application of his money, to those purposes for which it was said it was to be advanced.

This disposes of the principal grounds upon which the demurrers rest. With respect to the other objections, it appears to me that they are also unfounded. * The plaintiff, it is true, is * 401 a member of the company; but he is also a proprietor of the particular stock. He and those who have advanced the money which formed that stock, being the holders of the scrip upon which it is secured, have an interest totally unconnected with the general purposes of the company; and that is the very ground of the plaintiff's equity. If he had no scrip, he would be merely a member of the company; but having that scrip, he files his bill as proprietor of that scrip. The case is thus entirely clear of all those authorities that have been referred to, and it gives to that description of persons who are represented by the plaintiff, and to the plaintiff himself, a *locus standi* to see to the application of the money as to which the scrip is held, quite unconnected and independent of any objection that might arise from the plaintiff being a member of the company.

Then, with respect to another objection. It is said that the plaintiff is only holder of the scrip, and not the party with whom the contract was originally made. But whoever holds scrip, which is a marketable and transferable security, is invested with all the rights of the original party: he purchases it with certain rights

attaching to it; and it is one of those rights which the plaintiff here is endeavouring to assert.

I do not think, therefore, there is any objection, in point of form, to the shape in which this bill is framed; and upon the general equity it falls within the principle to which I have referred. I am therefore of opinion that the judgment of the Vice-Chancellor is correct, and that this appeal must be dismissed with costs.

* 402 * **MONCKTON v. THE ATTORNEY-GENERAL.** (a)

1848. March 29. April 12. 1850. June.

When a petition of right is referred to the Lord Chancellor with the indorsement "let right be done," if such right, supposing it to exist, be subject to certain rules of proceeding for its ascertainment and enforcement, those rules must still be followed, and the rights of the parties will be bound by all equities to which they are properly subject.¹

SAMUEL TROUTBECK, the testator in this case, being resident in the East Indies, and being entitled to some real estate and to a large personal estate there, made his will bearing date the 21st July, 1780, and thereby disposed of all his property in various charitable devises and bequests, and appointed the Honorable Edward Monckton and other parties trustees for carrying these devises and bequests into effect.

The testator having died in 1785, the trustees, on the 23d July, 1792, instituted a suit against his then Majesty's Attorney-General, praying that the trusts of the will might be carried into execution, so far as the same were valid; and, in case the charitable devises and bequests were not valid, then that the testator's estate might be disposed of for the benefit of his next of kin, if any such could be found, and, if not, then in such manner as his then Majesty

(a) This case was heard by the Lord Chancellor before the present reporters were the Reporters of the Court. Having however been favoured by his Lordship with the use of his written judgment, and one of them having been present in Court and taken notes of the arguments, they have thought it desirable to publish the report in the form now given.

¹ 1 Dan. Ch. Pr. (4th Am. ed.) 181 *et seq.*

should direct or appoint, or otherwise as, in the opinion of the Court, the same ought to be disposed of.

* In Michaelmas term, 1794, a decree was made referring * 403 it to the Master to take the usual accounts, with directions to publish advertisements for the heir-at-law and next of kin of the testator. On the 29th July, 1813, the Master made his report, which was absolutely confirmed, and a decree on further directions was made, bearing date the 4th July, 1814. By this decree it was declared, that the charitable devises and bequests contained in the testator's will were void ; and there not appearing to be any person or persons who were the testator's heir-at-law or next of kin, it was declared that the real and personal estate of the testator became vested in his then Majesty ; and all further directions were reserved until his Majesty should have signified his pleasure in relation thereto. In the year 1816, the proceeds of the testator's property, after deducting the costs of the suit, were paid into the Exchequer to the account of the civil list.

In the month of June, 1825, John Robson and Catherine his wife, and John Ainsley and Isabella his wife, claiming to be next of kin or some of the next of kin of the testator, together with George Cawthorne, claiming to be the heir-at-law or one of the co-heirs-at-law of the testator, presented a petition in the suit praying a reference to the Master to inquire who was the testator's next of kin and heir-at-law at the time of his death, and who were then his next of kin or heir-at-law ; and, on the 23d June, 1825, an order was made, with the consent of the Attorney-General on behalf of the Crown, accordingly. On the 22d June, 1827, the Master made his report to the effect that the claimants had not made out their claim, and that he was unable to answer the inquiries directed by the order. To this report the claimants, except George Cawthorne who had died, excepted ; and, on the 16th December, * 1828, the exceptions were overruled * 404 by the Master of the Rolls (Sir JOHN LEACH), and the Master's report was confirmed. From this order the claimants appealed to the Lord Chancellor (Lord BROUGHAM), who, on the 22d January, 1831, directed an issue for the purpose of trying the right of the claimants. This issue was tried accordingly, and the jury found a verdict for the defendant, the Attorney-General. On the 18th June, 1831, a motion was made before the Lord Chancellor for a new trial, but was refused. Several applications were sub-

sequently made by the claimants in order to obtain their costs, charges, and expenses; but on these applications no order was made.

On the 15th August, 1833, the claimants, on the allegation that they had obtained fresh evidence, moved, before the Lord Chancellor (Lord BROUGHAM), for a new trial of the issue formerly directed as above stated, and on this occasion his Lordship refused to make any order on the motion, but directed that the costs of the claimants and of the Attorney-General should be paid out of the fund. In consequence of this order, a sum of 2524*l.* was paid by the Lords of the Treasury to the solicitor of the claimants.

In the month of July, 1840, the claimants appealed to the House of Lords against the order of the 16th December, 1828, overruling their exceptions to the Master's report, and from the order of the Lord Chancellor of the 22d January, 1831, directing the issue, and from the orders of the 13th June, 1831, and the 15th August, 1833, so far as they refused the applications for a new trial. The orders appealed from were, however, affirmed by the House of Lords on the 18th August, 1843.

* 405 * On the 12th June, 1845, Catherine Robson and Isabella Ainsley (their husbands being dead), claiming to be sole next of kin and co-heiresses at law of the testator, presented their petition of right, claiming to have restored to them the sum of 400,000*l.*, as being together with interest the amount of the real and personal estate of the testator wrongfully seised into the hands and to the use of the Crown, upon an untrue suggestion and surmise that the testator had died without heir or next of kin, and the erroneous judgment and decree of the Court of Chancery made in pursuance of such untrue suggestion or surmise. The petition set forth all the former proceedings, and, relying on the former evidence, alleged certain new facts to have been since discovered, and insisted upon the importance of such fresh evidence as a ground for a fresh investigation of their claims; and the petition prayed that it might please her Majesty, for her royal zeal of justice and in her royal regard of charity, most graciously to consider the premises, and to order that right and justice might be done unto the suppliants in that behalf, and, after such due and lawful investigation and trial of the right of the suppliants as should be necessary in the premises, to order that the trust funds and premises paid to the use of the Crown might, together with the accruing dividends,

interest, and proceeds of the same, be paid and restored unto the suppliants as next of kin and co-heiresses at law of the testator, and, for the purposes aforesaid, that her Majesty would be graciously pleased to indorse upon that their petition of right her royal declaration and order to such effect as her Majesty should be pleased to deem necessary in that behalf, and, if necessary, to authorize and empower them the suppliants by such a royal declaration and order in that behalf to commence and prosecute such proceeding or proceedings for the better * investigation * 406 and trial of their said claims, and at such times, and in such Courts, and after such manner, as the nature of their claims should be found to require, and as her Majesty should be graciously pleased to direct; and that they, the suppliants, might have and obtain from her Majesty such further and other relief in the premises, under all the circumstances thereinbefore appearing, as should be by her Majesty deemed just and right.

On the 31st July, 1846, the royal fiat under the royal sign-manual "let right be done" was indorsed on the petition, and under the authority of this fiat the suppliants made an application to the Petty Bag office of the Court of Chancery, for a commission of inquest to inquire into the truth of the matters comprised in the petition of right; and on the 27th April, 1847, a commission was issued accordingly.

The commission was executed on the sole and *ex parte* direction of the suppliants; and in December, 1847, the jury found a verdict on such evidence as the suppliants thought fit to produce; and such verdict was as to certain facts inconsistent with the Master's report in the suit.

In January, 1848, the Attorney-General, on behalf of the Crown, filed an information, the general object of which was to restrain further proceedings on the part of the suppliants under their petition of right. To this information, the defendant Isabella Ainsley demurred for want of equity and want of parties, and the defendant Catherine Robson pleaded the proceedings under the petition of right, as a suit still depending in the Petty Bag in Chancery and undetermined. On the 4th February, 1848, the suppliants * served the Crown with notice of motion * 407 that the inquisition taken might be absolutely confirmed.

The demurrer and plea, and the motion to confirm absolutely the inquisition, together with a motion on the part of the Attor-

ney-General for an injunction, came on before the Lord Chancellor (Lord COTTENHAM) on the 22d March, 1848, when his Lordship, considering that the regular way of raising the question between the parties would be by a petition in the original suit, the demurrer and plea were allowed, and the other questions stood over in order to enable the Attorney-General to adopt the suggestion of his Lordship.

A petition was accordingly presented by the Attorney-General in the suit of *Monckton v. The Attorney-General*, setting forth the several facts before stated, and submitting that the proper remedy of the claimants was in Chancery, either by application in the present suit or by some new suit to review or alter the proceedings already had, but that no proceeding could be had at law in respect of the decrees and proceedings, except under the direction of the Court of Chancery, and with a due regard to other claimants, if any. The petition also stated, that since the indorsement of the fiat on the petition of right, other parties had raised claims in respect of the estate of the testator, and, after alleging that the object of the notice of the 4th February, 1848, was to use the commission and proceedings and the verdict, so as to compel the Crown to traverse or plead or demur to the facts comprised in the verdict or some of them with a view to have the same tried and decided at law, prayed, that Catherine Robson and Isabella Ainsley might be restrained by injunction from taking any proceedings in the office of the Petty Bag of the Court of Chan-

* 408 cery to confirm the verdict taken upon the inquisition, * or from taking any proceedings at law on the verdict or inquisition, or any proceeding arising out of or incident thereto, or from using the same proceedings or any of them, except under the order and direction of the Court as a Court of Equity, in the suit or such suit or other proceeding in Chancery as the Court should direct.

The Attorney-General (Sir J. JERVIS), *Mr. Twiss*, *Mr. Turner*, and *Mr. Wray*, in support of the petition, contended that the effect of allowing the claimants to proceed under their petition of right, would be to remove the decision of the question from the equitable jurisdiction of the Court of Chancery, and to transfer it either as a matter of common law to the Petty Bag, or to the Court of Queen's Bench; that at common law the rights of any other parties besides the suppliants who might have claims upon the fund could

not be properly dealt with ; that, even if there had been no proceeding in equity, the right course would have been to institute a suit for the administration of the testator's estate, and that, there being a suit already existing, it was quite clear that all matters relating to the administration must be taken in that suit. They further contended that the indorsement, "let right be done," conferred upon the Judge to whom the petition of right was delivered the power of directing the course of proceedings, and that, therefore, the Lord Chancellor had the same authority in this matter as he would have had if the litigation had been between private parties, in which case it was clear that, after the proceedings already taken, the parties would not have been allowed to carry their claims before a court of law. They insisted that the object of the general indorsement, "let right be done," and of the inquiry subsequent on that, was to enable the subject to litigate with the Crown, but that when by * these means the * 409 title of the party was put on record, the Lord Chancellor had full jurisdiction to regulate the course of the proceedings according to the circumstances of the case.

Mr. M. D. Hill, Mr. Adams, and Mr. Ansley, for the suppliants, contended, that it would be unjust to interfere with the claimants trying their rights in any way that might appear to them most desirable ; that to do so would be to make the Court active on behalf of the Crown against the suppliants, whereas they were entitled to be protected from any prejudice arising from having to litigate their case against the Crown ; that the present proceeding ought to be taken entirely irrespective of all that had been done in the suit of *Monckton v. The Attorney-General*.

[THE LORD CHANCELLOR here inquired of the counsel of the suppliants, if any case could be referred to where a matter of pure equity had been sent to be tried at common law.

In answer to this question they referred to the Year Books, 10 Hen. 4, fo. 4, pl. 8, 34 Hen. 6, fo. 50, 51 ; and to *Placitorum Abbreviatio* (by the Record Commissioners), p. 261 a.]

They further contended, that if the proceedings already had would protect the parties in a Court of Equity they would equally do so at common law, and that therefore the interference now

sought was unnecessary; that in fact, however, the decision of the House of Lords would be found not to bind the rights of the parties; that the suppliants were taking a regular proceeding, * 410 and if the effect of that regular proceeding * was to bring the matter under the cognizance of a Court of Law, it was not competent to a Court of Equity to interfere to restrain them; that the supposition of there being other claimants was no reason for interfering.

Mr. Turner, in reply, referred to the note to the case of *Smith v. Upton*, (a) and to Brooke's Ab. Tit. Petition, pl. 3, and contended, in reference to the instances cited on the other side as authorities for sending a matter of pure equity to common law, that it was impossible to ascertain with accuracy the facts of those cases.

The following cases and authorities were also referred to and commented on by the counsel on both sides in the course of the argument; *Walker v. Walker*, (b) *Rex v. Hornby* (the Bankers' Case); (c) *Carpenter v. Thornton*; (d) *In re Baron de Bode*; (e) *Gidley v. Lord Palmerston*; (g) Year Books, 11 Hen. 4, fo. 80; 13 Hen. 4, fo. 6, 14, 15; 35 Hen. 6, fo. 1, 2; 11 Hen. 7, fo. 21; 21 Hen. 7, fo. 30; 16 Vin. Ab. Tit. Prerog. Q. pl. 13; Staunforde on the King's Prerogative; and the argument of the Lord Keeper Somers in the *Bankers' Case* (h).

June, 1850.

The following judgment was delivered out to the parties by the Lord Chancellor, previously to resigning the Great Seal.

* 411 * There is much obscurity as to the proper mode of proceeding upon petitions of right after the stage which this case has attained, when the subject-matter is not properly cognizable by a Court of Law. I do not, however, find it necessary to pursue any inquiry upon that subject, finding in the peculiar facts of this case quite sufficient to justify the order I propose to make.

The parties prosecuting the petition of right are Catherine

(a) 6 M. & Gr. 251.

(b) 5 Mod. 13.

(c) 5 Mod. 30.

(d) 3 B. & A. 52.

(e) 6 Dowl. Pr. Ca. 776.

(g) 3 Brod. & B. 275.

(h) 14 State Trials, 39.

Robson and Isabella Ainsley, who came in before the Master, under a decree of 1794, directing an inquiry who were the next of kin of Samuel Troutbeck and an order of 1825. The Master having in 1813 reported that only one person (not either of these petitioners) had claimed but which claim had been disallowed and that there were no next of kin or heir-at-law, and the property having in 1815 and 1816 been accordingly paid to the officer of his Majesty's treasury, an order was made of 23d June, 1825, upon the petition of the present petitioners and their then husbands and another person, with the consent of the Attorney-General, referring it again to the Master to make the general inquiry as to the next of kin and heir-at-law of Samuel Troutbeck; and these parties having made their claim before the Master, it was by his report of June, 1827, disallowed. Exceptions taken by the present petitioners to this finding were overruled; but upon appeal an issue was directed, which produced a verdict against the claim. A motion for a new trial was refused, and a similar motion having been made in 1833, upon the ground of the discovery of new evidence, that motion was also refused. All these orders were, upon an appeal to the House of Lords, affirmed in 1843.

Both their husbands having died, the petitioners, in 1845, applied by petition of right for payment of the * money so * 412 transferred to the treasury, which petition received the usual indorsement, "let right be done," and, the usual commission having issued, the return finds certain facts confirmatory, as the petitioners allege, of their case, and they now insist that the Attorney-General is bound to meet their case upon this return by plea, traverse, or demurrer, which in effect would be to continue the litigation at law, and to try the cause upon the strength of the petitioners' case alone.

If the petitioners had been parties strangers to the former proceedings and claiming by force of a distinct and individual right, but in a manner which brought their claims within the ordinary jurisdiction of equity, much consideration would be due to the want of authority and precedent upon such a case; but in the present, assuming that the ordinary course would be what the petitioners allege it to be, the question still remains, would they, after what has taken place, be entitled to follow it? The proceeding by petition of right exists only for the purpose of reconciling the dignity of the Crown and the rights of the subject, and to protect

the latter against any injury arising from the acts of the former; but it is no part of its object to enlarge or alter those rights. When the petition is referred to the Chancellor with the indorsement, "let right be done," if such right, if it exist, be subject to certain rules of proceeding as to the means of its ascertainment and enforcement, such modes of proceeding must be followed, otherwise, in attempting to effect the direction of the indorsement, the opposite effect would in many cases be produced. So, if the rights of the petitioners, if proved to exist, have been bound by equities, such equities must be considered and permitted to operate upon such rights.

* 413 * What then is the case of the present petitioners? They came in by special leave to claim as next of kin in 1825 before the Master in a cause in which the property in question was administered; they have failed before the Master, before the Court, before a jury, and before the House of Lords; and they now insist that, disregarding all these proceedings, they are to recover the property, unless the Attorney-General shall succeed in a traverse of some fact in issue, or in some plea he may put in. Suppose the case had been one in which the claim might have been originally prosecuted either at law or in equity, and that similar proceedings in equity had taken place, it cannot for a moment be supposed that what is now contended for would have been permitted, and the claimants allowed to prosecute their claim at law. Why then is not "right to be done" to these parties in the same manner? the Crown has put them upon the same footing as if they were contending with a fellow-subject, but that is all it has done.

My order will be according to the prayer of the petition of the Attorney-General, adding only, "the petitioners Catherine Robson and Isabella Ainsley being at liberty to institute such proceedings, or to make such applications in this Honorable Court, relative to the matter of the said petition of right, as they may be advised."

* MEMORANDUM.

* 414

The Attorney-General v. Pilgrim (a) was affirmed by the Lord Chancellor on the 25th February, 1850.

In re The Vale of Neath and South Wales Brewery Company, Ex parte Walters, (b) was affirmed by the Lord Chancellor on the 8th March, 1850.

In re The Vale of Neath and South Wales Brewery Company, Ex parte White, (c) was affirmed by the Lord Chancellor on the 8th March, 1850.

(a) 12 Beav. 57.

(b) 3 De G. & S. 149.

(c) 3 De G. & S. 157.

[319]



AN INDEX
TO
THE PRINCIPAL MATTERS
CONTAINED IN THIS VOLUME.

ACCOUNT.

Principles on which the Court deals with settled accounts in reference to granting relief either by a decree to surcharge and falsify, or by a decree to take an open account.

In a case where the accounting party was the solicitor or agent of the party sought to be charged, and it appeared that an item of 600*l.* was inserted for professional charges in the account, which it was sought to treat as settled, no bill of costs having been delivered, and the 600*l.* exceeding by 75*l.* the sum really due: *Held*, that this was not such an error as could be set right by a decree to surcharge and falsify, but that the account must be dealt with as an open account. — *Coleman v. Mellersh*, 309.

ACQUIESCENCE. See FRAUD ON MARITAL RIGHT.

ACT OF PARLIAMENT.

1. The Corporation of the Trinity House were empowered by the Act 6 & 7 Will. 4, c. 79, to purchase light-houses; and the Act directed that all the reasonable costs, charges, and expenses of reinvesting the purchase-money should be borne by the corporation: *Held*, in the absence of any proof of an attempt to throw expense upon the corporation by an improper exercise of the power of reinvestment, that there was no limit to the number of separate investments, for the costs of which the corporation were liable. — *Jones v. Lewis*, 168.
2. Commissioners under a local Act * of Parliament, the object of which * 416 was to supply the town of S. with water, were empowered to raise funds by assessment, to be applied in certain specified ways, having immediate reference to the purposes of the Act, and in otherwise carrying the Act into execution: *Held* that, although the commissioners might have properly applied the funds raised in resisting a proceeding in Parliament prejudicial to the object of the Act, yet they were not justified in applying them to defray the expense of obtaining another Act of Parliament

giving more extensive powers for carrying out the object of the existing Act. — *The Attorney-General v. Andrews*, 225.

See RAILWAY COMPANY, 2.

AFFIDAVITS. See PRACTICE, 2.

AGENT.

An agent cannot get an adverse title, unless he can distinctly show that the acts on which he relies are in respect of title, and not in respect of agency. — *The Attorney-General v. The Corporation of London*, 247.

AGREEMENT. See RAILWAY COMPANY, 2.

ALLOTTEE. See WINDING-UP ACTS, 1, 6.

AMENDING PLEA. See PRACTICE, 4.

ANSWER. See PRACTICE, 3, 6.

APPEAL. See PRACTICE, 2.

ATTORNEY-GENERAL'S COSTS. See PRACTICE, 11.

BOND.

The obligee of a bond having placed himself in such a position with regard to the principal debtor that he could not demand payment of the bond until a certain agreement entered into with third parties had been carried into effect: *Held*, that this was such a giving of time to the principal debtor as discharged a surety to the bond. — *Cross v. Sprigg*, 113.

CAPITAL. See WINDING-UP ACTS, 2.

CESTUI QUE TRUST. See TRUSTEE.

* 417 * COMMISSIONERS. See ACT OF PARLIAMENT, 2.

COMMITTEE. See LUNACY, 2.

COMPENSATION. See VENDOR AND PURCHASER, 1.

COMPULSORY POWERS OF TAKING LAND. See SPECIFIC PERFORMANCE.

CONSTRUCTION. See ACT OF PARLIAMENT, 2. COPYRIGHT. ELECTION. LANDS CLAUSES CONSOLIDATION ACT, 1845. RAILWAY COMPANY, 2.

VENDOR AND PURCHASER, 2.

CONTRACTS. See EQUITY, 2, 4.

CONTRACT, RESCINDING. See VENDOR AND PURCHASER, 1.

CONTRIBUTORY. See WINDING-UP ACTS, 1, 3, 4, 5, 6, 7.

COPYRIGHT.

Whether in the condition of copyright mentioned in the 4th section of the Designs Copyright Act (5 & 6 Vict. c. 100) that the design has before publication been registered, the term publication is limited to publication after the design has been embodied and introduced into some fabric, *quære*. — *Dalglisk v. Jarvie*, 231.

COSTS. See ACT OF PARLIAMENT, 1. PRACTICE, 11.

CURATOR BONIS. See LUNACY, 3.

DECREE. See PRACTICE, 13.

DEED. See VENDOR AND PURCHASER, 2.

DELAY. See **PRACTICE**, 12.

DEMURRER.

A railway company having power under separate Acts of Parliament to make and purchase certain branch railways in connection with their main line, were for those purposes respectively authorized to raise the requisite capital by the creation of new stock. Having issued scrip certificates, * but being about to apply the money subscribed in respect * 418 thereof to the prosecution of works on their original line, a holder of such scrip filed his bill on behalf of himself and all other the proprietors of such scrip against the company and its directors, praying an injunction to restrain the company and the directors from employing any money which had been subscribed in respect of the new stock towards the completion of the original line, or otherwise than in the completion of the works for which the money was subscribed. *Held*, overruling demurrers of the company and directors for want of equity and want of parties, first, that upon the construction of the Acts of Parliament creating the new stock, the capital raised by the scrip was not to be considered as identical with or part of the original capital of the company, and that the holders of the scrip had a clear equity to keep the company in the application of the money raised to those purposes for which it was advanced. Secondly, that the plaintiff, as owner of such scrip, had a right in that character to file his bill clear of any objection to which such bill might have been open had he merely been a member of the company. Thirdly, a holder of scrip by purchase is invested with all the rights of the original subscriber. — *Bagshaw v. The Eastern Union Railway Company*, 389.

See **EQUITY**, 1.

DIARY. See **EVIDENCE**, 1.

DIRECTOR. See **PUBLIC COMPANY**.

DISCOVERY.

A plaintiff is entitled to discovery from the defendant, not only of that which constitutes his, the plaintiff's, title, but also for the purpose of repelling what he anticipates will be the case set up by the defendant. This does not extend, however, to a discovery of the evidence upon which the anticipated case of the defendant is to be supported. The object of the Act 21 Jac. 1. c. 14, was to put a defendant litigating with the Crown in the same situation as any other defendant; but this statute does not apply in equity, where, in the matter of discovery, the Crown and a subject litigating together are precisely on the same footing as ordinary parties.

Semble, a defendant cannot protect himself from discovery on the ground of disclosing the evidence of his title, where his only allegation of title is negating the title of the plaintiff.

Where the bill charges that the defendant is in possession of * docu- * 419 ments which relate to the matters in question in the suit, the defendant cannot protect himself from setting out a list and description of such documents by merely alleging his belief that they do not contain evidence

or tend to show the plaintiff's title, but he is bound distinctly to negative the allegations in the bill. — *The Attorney-General v. The Corporation of London*, 247.

ELECTION.

On a question of election by a party bound to elect between two properties, it is necessary to inquire into the circumstances of the property against which the election is supposed to have been made; for if a party so situated, not being called on to elect, continues in the receipt of the rents and profits of both properties, such receipt cannot be construed into an election to take the one and reject the other; and, in like manner, if one of the properties does not yield rent to be received, and the party liable to elect deals with it as his own by mortgaging the same, &c. (particularly if this is done with the knowledge and concurrence of the party entitled to call for an election), such dealing will be unavailable to prove an actual election as against the receipt of the rents of the other property. The liability of a party to be called upon to elect will not be affected by lapse of time, so long as his interest in either of the subject-matters of election is reversionary.

J. C. being entitled in fee to undivided moieties of two freehold houses, and also to an undivided moiety in a leasehold house, by his will devised, "all that my freehold messuage or tenement with the garden," &c., referring to one of the houses only: *Held*, that these words were a gift of the entirety of the house referred to, and raised a case of election as against the party entitled to the other moiety, and who took beneficially under the will.

The construction of the devise above stated held to be corroborated by the fact of the testator having used apt words in disposing of his interest in the leasehold. — *Padbury v. Clark*, 298.

EQUITY.

1. The shares of a proprietor in a joint-stock company were sold, but without his authority, and not in conformity with the provisions of the deed by which the company was constituted. On a bill filed by the shareholder, alleging that the sale was the fraudulent act of the secretary of the company, and sanctioned by the directors, but assuming the transaction to be valid as against the transferee, and praying that the * loss might be made good out of the assets of the company, demurrer for want of equity, allowed, on the ground that the bill stated no case for making the company liable in damages.

* 420

Held, also, that the transferee of the shares was not a necessary party to the suit. — *Duncan v. Lunley*, 30.

2. In a suit arising out of a contract between the plaintiff and the defendant, it appeared that if the contract had been correctly acted on, the plaintiff would have had a legal right against the defendant, but that he was deprived of this right by the acts of the defendant and his agents: *Held*, under these circumstances and on demurrer to a bill filed for discovery and for relief according to the terms of the contract, that for the

defendant to use these acts as a means of defeating the plaintiff's remedy, was a fraud which the Court would interfere to prevent, and also that it was no answer to the plaintiff's claim to say that the conduct of the defendant rendered him subject to an action for damages by the plaintiff. — *M'Intosh v. The Great Western Railway Company*, 74.

3. Although the Court will, in a proper case, exercise its jurisdiction by injunction touching proceedings in Parliament for a private bill or a bill respecting property, yet it has no power to interfere to deprive a party of the right of applying to Parliament for a special law to supersede the rules of property by which he finds himself bound, whether arising from contract or otherwise. — *Heathcote v. The North Staffordshire Railway Company*, 100.
4. A. and B. entered into a joint adventure for the purchase of goods to be shipped to China, to be there sold, and the proceeds of the sale invested in a homeward cargo. A. was to render himself liable for the payment of the goods purchased, and B. was to supply A. with a share of the money by a fixed time, so as to enable A. to meet this liability. At the time fixed A. applied to B. for the money, but B. failed to supply it. In consequence of this, and after some negotiation on the subject, A. offered to allow B. to withdraw from the adventure altogether, and this offer was ultimately accepted. Down to the time when A. applied to B. for the money, A. had communicated to B. all the information which he possessed relative to the adventure and to its chances of success, which then appeared very doubtful; but while the negotiation was going on A. received two letters from his correspondents in China, through whom the business was managed, the contents of which he did not communicate to B. Held, in a suit impeaching the arrangement by which B. gave up his share of the adventure, that, considering the relative situation * of the parties, there was no obligation on the part of * 421 A. to communicate to B. the letters in question; and that, there being no proof of misrepresentation by A., the arrangement could not be set aside merely on the ground of the non-communication of the letters. — *M'Lure v. Ripley*, 274.
5. The owner of certain land required by a railway company, on being served with the usual notice, stated his desire to have the amount to be paid to him for compensation and damages settled by arbitration under the provisions of the Lands Clauses Consolidation Act, 1845. Arbitrators were accordingly appointed by the land-owner and the company, and these arbitrators not being able to agree upon an umpire, an umpire was ultimately appointed by the commissioners of railways. In the mean time the company having paid into the bank the amount claimed by the land-owner, and having given the bond required in such cases by the Act, entered upon the land. The arbitrators not having made their award in time, the questions of compensation and damage came before the umpire, who made his award, giving the land-owner a much less sum than that claimed by him from the company. The land-owner having refused to deliver an abstract of title, or to take any steps for conveying

the land, the company proceeded, under the provisions of the Act applicable to such a case, and paid into the bank the sum awarded by the umpire. They then presented a petition for payment out to them of the sum paid in by them before taking possession of the land. The land-owner, in the mean time, had taken proceedings at law, to set aside the award on various grounds, but without success, and was, at the time when the petition was presented, prosecuting an action against the company to recover the amount originally claimed by him. Under these circumstances the land-owner opposed the petition of the company, but the Lord Chancellor made the order prayed, holding that the land-owner was not entitled to avail himself of the security provided by the Act in the deposit of the money, and at the same time to repudiate the proceeding, the benefit of the result of which it was the object of the Act thus to secure to him. — *Ex parte the Wilts, Somerset, and Weymouth Railway Act. In re C. B. Fooks*, 357.

See SOLICITOR AND ARTICLED CLERK. PUBLIC COMPANY.

EVIDENCE.

- * 422 1. An entry in the diary of a solicitor's clerk, who had become lunatic, not allowed to be read in evidence of a matter concerning * which it was not the duty of the clerk to have made such entry. — *Coleman v. Mellersh*, 309.
2. A receipt not having a proper stamp, cannot be used as evidence of a matter collateral to the payment of money. Thus, in a case where it was sought to prove an agreement for purchase by means of a receipt for the purchase-money, such receipt not being properly stamped: *Held*, that the evidence could not be admitted. — *Evans v. Prothero*, 319.

See PRACTICE, 8.

FOREIGN COUNTRY. See WINDING-UP ACTS, 2.

FORFEITURE, CLAUSE OF. See WILL.

FRAUD. See EQUITY, 4. RAILWAY COMPANY, 2.

FRAUD ON MARITAL RIGHT.

A woman a few days before her marriage, and without the knowledge of her intended husband, transferred a sum of stock to trustees, upon a parol trust, as alleged by the trustees, for her separate use for life, and, after her death, for the benefit of her children. The fact of this transfer became known to the husband some time after the marriage. The dividends were received by the wife from the date of the marriage until her death, which took place seventeen years after. After her death, the husband filed a bill praying a transfer of the stock, and containing a statement that the dividends were duly paid to the wife during the coverture. *Held*, under the circumstances, that the husband was precluded from asserting his claim to the stock, as having been transferred in fraud of his marital right. — *Loader v. Clarke*, 382.

FRAUDULENT USE OF LEGAL RIGHTS UNDER CONTRACT. See EQUITY, 2.

GENERAL ORDERS. (23d Order of 26th August, 1841.) See PRACTICE, 5.
(38th Order of 26th August, 1841.) See PRACTICE, 3.

HUSBAND AND WIFE. See PRACTICE, 6.

* INJUNCTION.

* 423

1. A Court of Equity will not exercise its jurisdiction by injunction at the instance of an individual against an alleged nuisance, without a previous trial at law, or without its being clearly proved that the plaintiff has sustained such substantial injury as would have entitled him to a verdict for damages in an action at law.

The defendant diverted a stream as it passed through his premises, but restored it undiminished as to the quantity of water to its former channel, before it reached the premises of the plaintiff; the defendant also employed the stream while on his premises, in a way which rendered the water unfit for ordinary use; but he alleged that the water, by the time it reached the plaintiff's lands, was freed to the utmost possible extent from any noxious ingredients with which it had become impregnated, and it did not appear that any actual damage was sustained by the plaintiff. Under these circumstances the Lord Chancellor dissolved an injunction which had been granted by the Vice-Chancellor, restraining the defendant from using and diverting the water. — *Elmhirst v. Spencer*, 45.

2. A party agreed with a railway company to withdraw his opposition to their bill in Parliament, in consideration of their completing their line of railway in a particular manner. The company subsequently found themselves unable to carry their contract into execution, and gave notice of their intention to apply to Parliament for an Act to authorize them to abandon their scheme. The Lord Chancellor dissolved an injunction, granted by the Vice-Chancellor of England at the suit of the party, with whom the company had contracted, restraining the company from making this application. — *Heathcote v. The North Staffordshire Railway Company*, 100.

See EQUITY, 3. PRACTICE, 9. RAILWAY COMPANY, 1.

INSOLVENCY. See PRACTICE, 4.

ISSUE DEVISAVIT VEL NON. See WILL.

JOINT-STOCK COMPANY. See EQUITY, 1.

LANDS CLAUSES CONSOLIDATION ACT, 1845.

Whether, in a case depending exclusively on a notice to take land

* given by a company under the provisions of the Lands Clauses Consolidation Act, 1845, the Court will interfere to compel the company to adopt the subsequent proceedings directed by the Act for giving compensation to the land-owner, *quære*.

In a case where such a notice had been followed by a claim to compensation on the part of the land-owner, and a subsequent agreement between the parties, which claim and agreement was, however, ultimately abandoned and repudiated on both sides, the Court allowing a demurrer to a bill filed by the land-owner, refused to interfere to compel the company, who were in possession of the land, to summon a jury, holding that in this case the notice *per se* did not give the Court jurisdiction, and that the rights of the parties were to be regulated by the provisions of the 68th and 85th sections of the Lands Clauses Consolidation Act, 1845.

The provisions of the 68th section of the above Act apply to the case of land taken under those of the 85th section. — *Adams v. The London and Blackwall Railway Company*, 118.

See EQUITY, 5.

LEASE. See RAILWAY COMPANY, 2.

LIABILITY. See EQUITY, 1. WINDING-UP ACTS, 3, 4.

LORD CHANCELLOR. See PRACTICE, 13.

LUNACY.

1. On petition under the Act 1 Will. 4, c. 60, the Court never interferes in the administration of the trusts, but merely substitutes a trustee in the place of the lunatic. — *In re Ward*, 73.
2. Order made for payment of lunatic's maintenance to a married woman (committee of the person) on her separate receipt, her solicitor undertaking that the money should be duly applied. — *In re Edwards*, 134.
3. Application by the curator bonis of a Scotch lunatic for the transfer of stock standing in the lunatic's name in the Bank of England refused; the Lord Chancellor not being satisfied that the security given by the curator in Scotland was sufficient, and holding that it was a matter of discretion to refuse or accede to the application.

Terms of order of reference to the Master in such a case, the decret of the Scotch Court appointing the curator not being sufficient to establish the lunacy under the terms of the Acts 1 & 2 Geo. 4, c. 15, and 1 Will. 4, c. 65. — *In re Stark*, 174.

* 425 * MARRIED WOMAN. See LUNACY, 2.

MISAPPROPRIATION OF CAPITAL. See DEMURRER.

MISTAKE. See VENDOR AND PURCHASER, 2.

MORTGAGEE. See TRUSTEE.

MORTGAGOR. See TRUSTEE.

NUISANCE. See INJUNCTION, 1.

PAROL TRUST. See FRAUD ON MARITAL RIGHT..

PARTIES. See DEMURRER. EQUITY, 1.

PETITION OF RIGHT.

When a petition of right is referred to the Lord Chancellor with the indorsement "let right be done," if such right supposing it to exist be subject

to certain rules of proceeding for its ascertainment and enforcement, those rules must still be followed, and the rights of the parties will be bound by all equities to which they are properly subject. — *Monckton v. The Attorney-General*, 402.

PLEA. See PRACTICE, 4.

PLEADING. See DISCOVERY. EQUITY, 1. PRACTICE, 4.

PRACTICE.

1. Where a party not being a party to the suit, desires to have the same reheard, he must apply to the Court in the first instance for permission to present a petition of rehearing. — *Berry v. The Attorney-General*, 16.
2. Although there is no rule of practice, that in cases where the will is in contest in the Ecclesiastical Court, the Court of Chancery will not grant a receiver where the property is in the hands of the executor, yet it must be clearly shown that the nature and position of the property is such as to warrant the interference of the Court.

Under what circumstances fresh affidavits may be read on the *hear- * 426 ing before the Lord Chancellor of a motion to discharge or vary an order of the Vice-Chancellor. — *Whitworth v. Whyddon*, 52.

3. A bill filed against an arbitrator charged fraud and collusion between the arbitrator and one of the parties to the award, and alleged certain specific facts in support of this charge. *Held*, that the arbitrator could not, by denying the fraud generally, protect himself from the obligation to answer the interrogatories as to the specific facts.

The 38th Order of the 26th August, 1841, enables a defendant to decline answering such interrogatories only as anterior to that order, he might have protected himself from answering by demurrer. — *Padley v. The Lincoln Waterworks Company*, 68.

4. A plea by one of two defendants of the insolvency of the other, held to be good, notwithstanding the insolvency occurred after the filing of the bill.

Plea allowed to be amended by substituting the word "suit" for the word "bill." — *Sergrove v. Mayhew*, 97.

5. The Lord Chancellor refused to make an order for the service of a copy of the bill, under the terms of the 23d Order of the 26th August, 1841, upon a defendant in Ireland. — *Lorton v. Kingston*, 139.
6. Practice as to enforcing answers from husband and wife, where the latter is living separate from her husband, and out of the jurisdiction. — *Nichols v. Ward*, 140.
7. The Lord Chancellor refused upon motion to appoint a receiver of a partnership, where the question raised was, whether the partnership had been dissolved; but directed an issue to try that fact. — *Fairburn v. Pearson*, 144.
8. The general rule is, that depositions taken *de bene esse* are not to be published in cases where the witness might have been, and was not, examined in the regular way, the proper period for such examination being between the time when the cause is at issue, and when publication passes. This general rule is, however, liable to exception in a special case.

Where the right or liability to account is in question in a cause and not particular items of account, it would be improper for the purposes of the hearing to examine witnesses upon particular items not specially charged in the pleadings to be erroneous; and, therefore, in such a case, and as an exception to the general rule, the depositions of a witness examined *de bene esse* as to particular items might be published after the hearing of the cause, although such witness might have been, and had not been, examined in the regular way before publication passed, *semble*.

- * 427 The case of a witness examined *de bene esse* as to the general correctness * of accounts, and not examined subsequently as he might have been in a regular way, held not to constitute an exception to the general rule; and a motion after the hearing to publish his evidence for the purpose of using it in the Master's office refused. — *Forsyth v. Ellice*, 209.

9. A party is entitled to move to dissolve an injunction, if, from ambiguity in its terms, he may under any construction of the order be prejudicially affected.

It is the duty of a party asking for an injunction to bring under the notice of the Court all facts material to the determination of his right to that injunction; and it is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward. Thus, where a plaintiff obtained an *ex parte* injunction on the facts stated in the bill, but other facts came out in the defendant's answer raising a question of law on which the right of the plaintiff to the injunction depended: *Held*, that the omission of the plaintiff to bring these facts under the notice of the Court was of itself a sufficient ground for dissolving the injunction. Principles on which the Court acts on an application for an injunction to restrain a party from prosecuting a legal right. — *Dalglish v. Jarvie*, 231.

10. One of several defendants by his answer admitted the possession of documents; but by an affidavit subsequently filed, stated that since his answer he had deposited them with one of his co-defendants. A motion for their production refused in the absence of the co-defendant. — *Burbidge v. Robinson*, 244.

11. In a suit by the Attorney-General the general rule as to costs is, that, as the Crown does not pay costs, the Attorney-General does not receive costs where, if a private individual, he could have been called on to pay them. Where, however, if a private individual he could not have been called on to pay costs, the rule does not apply. Thus, in a case where the Attorney-General had excepted to the defendant's answer for insufficiency, and the exceptions had been allowed by the Master: *Held*, on affirming this decision, by the Master of the Rolls, and subsequently on appeal by the Lord Chancellor, that the Attorney-General was entitled to costs, the rule being that a party who merely supports the decision of a competent jurisdiction is never called on to pay the costs of so doing.

The decision of the House of Lords on the question of costs in the case of *The Corporation of London v. The Attorney-General*, 1 H. L. 471, observed upon. — *The Attorney-General v. The Corporation of London*, 247.

12. Effect of delay on the part of a plaintiff in equity, seeking to stay * a proceeding at law. — *M'Lure v. Ripley*, 276. * 428

13. In a suit in which an incorporated company were plaintiffs, a decree was pronounced by the Vice-Chancellor of England, in favour of the plaintiffs, and was affirmed on appeal by the Lord Chancellor. The defendant having afterwards discovered that the Lord Chancellor was a shareholder in the company, moved to discharge his Lordship's order, on the ground that his interest in the matter rendered the order void. The Master of the Rolls having, at the request of the Lord Chancellor, heard this motion, was of opinion that it ought to be refused with costs. The defendant having subsequently been committed for the breach of an injunction granted in the suit, and made perpetual by the decree, moved to set aside the order for his committal, and at the same time renewed his former motion, seeking also to stay all proceedings in the suit, and to take the bill off the file. The Master of the Rolls who, on this occasion, sat with the Lord Chancellor, adhered to his former opinion, holding also that there was nothing in the circumstance that the objection of interest did not appear on the record, or otherwise in the case, which prevented the defendant from bringing the decree or any order made in the suit by the Lord Chancellor by appeal before the House of Lords, or from obtaining a second rehearing of the same before the Lord Chancellor, the Lord Chancellor concurring in the opinion of the Master of the Rolls, the application was dismissed, with costs.

The signing of an order or decree of a subordinate Judge by the Lord Chancellor, makes it, in point of form, the order or decree of the Lord Chancellor. — *The Grand Junction Canal Company v. Dimes*, 285.

See EVIDENCE, 2. PETITION OF RIGHT. WILL.

PREMIUM. See SOLICITOR AND ARTICLED CLERK.

PRODUCTION OF DOCUMENTS. See PRACTICE, 10.

PROVISIONAL COMMITTEE-MAN. See WINDING-UP ACTS, 3, 4, 5.

PUBLICATION OF DEPOSITIONS. See PRACTICE, 8.

PUBLIC COMPANY.

At a meeting of a company regularly convened, resolutions were passed, removing certain directors for misconduct, the deed of settlement of the company providing that such a meeting might * remove any * 429 director "for negligence, misconduct in office, or any other reasonable cause." Other directors were subsequently elected in their place. A bill was then filed by the removed directors to set aside the proceedings of the meeting, and the election of the new directors. *Held*, on a motion for an injunction to restrain the new directors from acting, that the expression "reasonable cause" in the company's deed did not refer to such a cause as in a court of justice would be held reasonable,

but only to such a cause as should be deemed reasonable by the shareholders assembled at a meeting duly convened, and therefore that the Court had no jurisdiction to interfere; nor, where no case of direct fraud was proved, to determine whether the decision of the meeting had, or had not, been unduly influenced by unfounded statements, made by persons taking an active part in the proceedings. — *Inderwick v. Snell*, 216.

See EQUITY, 2, 3. RAILWAY COMPANY, 2.

RAILWAY ACTS. See SPECIFIC PERFORMANCE.

RAILWAY COMPANY.

1. The directors of a railway company with the concurrence of a majority of the shareholders, on finding the original undertaking impracticable, proceeded to construct a small portion only of the works. On an application by an individual shareholder on behalf of himself and the other shareholders for an injunction to restrain this proceeding, the Court refused to interfere, on the ground of the acquiescence of the plaintiff; and also that the other shareholders had for eighteen months previously to filing the bill known, or had had the means of knowing, the acts complained of. — *Graham v. The Birkenhead, Lancashire, and Cheshire Junction Railway Company*, 146.

2. A bill before Parliament for the purpose of enabling one railway company to grant to another railway company a lease of certain contemplated lines of railway, was opposed by a third company. An agreement was ultimately come to by which, in consideration of the third company withdrawing their opposition, the other two companies engaged to conduct their traffic in a certain specified manner, so as not to prejudice the interests of the third company. *Held*, overruling demurrers to a bill filed by the third company for a specific performance of this agreement, that there was nothing in the agreement contrary to the duty which the parties respectively owed to Parliament, or to the public and their own subscribers.

* 430 * *Held* also, on the construction of the Act of Parliament, that the operation of the agreement was not postponed until all the contemplated lines were completed; but that the rights and liabilities of the two companies *inter se* on which the agreement with the third company depended, arose on the completion of any one of the contemplated lines. — *The Shrewsbury and Birmingham Railway Company v. The London and North Western Railway Company*, 324.

See DEMURRER. EQUITY, 2, 3, 5.

RATES. See ACT OF PARLIAMENT, 2.

RECEIPT. See EVIDENCE, 2.

RECEIVER. See PRACTICE, 2, 7.

REHEARING. See PRACTICE, 1.

SALE UNDER ORDER OF COURT. See VENDOR AND PURCHASER, 1.

SERVICE. See PRACTICE, 5.

SETTLED ACCOUNTS. See ACCOUNT.

SOLICITOR AND ARTICLED CLERK.

An attorney, to whom a clerk was articulated, died before the articles expired; *Held*, that the Court had jurisdiction to entertain a claim for the return of a part of the premium, and that such claim constituted a debt payable out of the assets of the attorney. — *Hirst v. Tolson*, 134.

SPECIFIC PERFORMANCE.

Although the compulsory taking of land under the provisions of railway Acts, may, to a certain extent and for certain purposes, place the company and the land-owner in the relative position of purchaser and vendor, yet it does not follow that a Court of Equity will decree the specific performance of such sales. — *Adams v. The London and Blackwall Railway Company*, 118.

See RAILWAY COMPANY, 2. VENDOR AND PURCHASER, 1.

STATUTES.

21 Jac. 1, c. 14. See DISCOVERY.

1 & 2 Geo. 4, c. 15. See LUNACY, 3.

1 Will. 4, c. 60. See LUNACY, 1.

1 Will. 4, c. 65. See LUNACY, 3.

6 & 7 Will. 4, c. 79. See ACT OF PARLIAMENT, 1.

* 8 Vict. c. 18. See EQUITY, 5. LANDS CLAUSES CONSOLIDATION ACT, * 431 1845.

11 & 12 Vict. c. 45. See WINDING-UP ACTS.

12 & 13 Vict. c. 108. See WINDING-UP ACTS.

SURETY. See BOND.

TRUSTEE.

The circumstance that two parties stand to each other in the relation of trustee and *cestui que trust* does not affect any dealing between them unconnected with the subject of the trust.

Thus the rule that a trustee cannot purchase from his *cestui que trust* does not extend to a purchase by a mortgagee from his mortgagor. — *Knight v. Marjoribanks*, 10.

See LUNACY, 1.

VENDOR AND PURCHASER.

1. If property not intended to be sold, be, by the ignorance or neglect of the vendor's agent, included in a contract for sale with other property intended to be sold, a case may arise in which the Court will refuse to compel the specific performance of the whole contract; and if, in such case, the purchaser should decline to take so much as was intended to be sold, the course which the Court might adopt would probably be to abstain from interfering, leaving the purchaser to his remedy at law, but it certainly would not rescind the contract. This course, however, cannot be followed in reference to sales, under orders of the Court in which the Court must decide whether the sale

is to be carried into effect, or the property resold; but in these cases it is expedient, as far as possible, to adopt the rules which regulate the practice as between ordinary vendors and purchasers:

Thus, in the case of a sale under the order of the Court, it being clear that a certain portion of property was not intended by the vendor to be included in the contract of sale, the Court, in the absence of any proof of misconduct in the purchaser or his agent, refused to compel a specific performance by the purchaser, excluding the portion in question.

The purchaser, however, electing to take exclusive of the portion of property in dispute, the Court ordered accordingly, and without compensation. — *Alvanley v. Kinnaird*, 1.

2. W. H. was entitled for life to the interest of certain residuary estate to the principal of which the wife of A. J. was entitled absolute. W. H. being largely indebted to A. J., executed an indenture, assigning * to A. J. all his, W. H.'s, interest in the said residuary estate. It was subsequently discovered that the residuary estate consisted partly of a fund, the existence of which was unknown to either of the parties at the time of the execution of the indenture. W. H. thereupon filed a bill which, not complaining that the indenture had been executed by fraud, sought to exclude from its operation the additional fund by treating the indenture merely as a security for the amount then due from W. H. The Lord Chancellor, under these circumstances, dismissed the bill, holding that the words of the indenture were sufficient to pass the interest of W. H. in the fund in question, and that no case was made in the pleadings for reforming the instrument. — *Howkins v. Jackson*, 372.

See TRUSTEE.

VICE-CHANCELLOR. See PRACTICE, 13.

WILL.

A testator being subject to a commission of lunacy, gave by his will certain benefits to his only daughter, a married woman, who was also his heiress-at-law, and declared that, if she or her husband, or any person on their or either of their behalf, should dispute his will, or if any proceedings should be taken by any person whomsoever, by any possible result of which any estate or interest could be in any way attainable by his daughter or her husband of larger extent than was intended for her by the will, and she and her husband should not formally disavow, stay, or resist such proceedings to the best of their ability, then he revoked the benefits given to her. The heiress-at-law, on occasion of her marriage and during her minority, had joined with her husband in assigning her expectant interest to the trustees of her marriage settlement. The trustees of the will filed their bill to have the will established and the trusts carried into execution, and adduced proof of the sanity of the testator at the date of his will; to this suit the heiress-at-law, and the trustees of the settlement were made parties. *Held*, without deciding on the validity of the settlement, that the plaintiffs

were bound to prove their title as against the trustees of the settlement, and the Court accordingly, at the instance of these trustees, directed an issue *devisavit vel non*.

In order to protect the heiress-at-law from the clause of forfeiture contained in the will, the Court directed a statement to be inserted in the order, that the issue was directed at the instance of the trustees of the settlement. — *Cooke v. Cholmondeley*, 18.

* WINDING-UP ACTS, 1848, 1849.

* 433

1. An allottee of shares paid the required deposit thereon, and received the scrip certificates of the shares, acknowledged the receipt thereof, and was registered as a shareholder. The company commenced operations before its capital was fully subscribed, but afterwards discontinued its business as unprofitable, the scheme being neither fraudulent nor abortive. The allottee was held to be a contributory, although he had not signed the deed of settlement, nor paid any of the calls when demanded, nor taken any part in the affairs of the company.

Observations by the Lord Chancellor on the effect of placing the name of a person on the list of contributories. — *In re The Universal Salvage Company, Ex parte the Earl of Mansfield*, 57.

2. A company formed for making a railway in Spain, one-third of the capital of which was appropriated to Spanish subscribers, was conducted by a board of directors in London, assisted by a committee at Madrid: *Held*, that this was an English company, and within the provisions of the Winding-up Acts.

In this case it appeared that the money subscribed by the Spanish shareholders had been returned: *Held*, that such a reduction of the capital was a sufficient ground for winding up the company. — *In re Madrid and Valencia Railway Company, Ex parte Turner, Ex parte James*, 169.

3. A. B., one of the Provisional Committee of a joint-stock company, became desirous of withdrawing. He thereupon declined to take the shares proposed to be allotted to him as a Provisional Committee-man, and gave authority to the secretary of the company to withdraw his name from the list of the Provisional Committee. This authority was not acted upon, and the name of A. B. continued on the list of the Provisional Committee. No shares were allotted to him, but he subsequently attended meetings of the Provisional Committee, and paid various sums of money in pursuance of resolutions passed at those meetings towards liquidating the liabilities of the company. *Held*, under these circumstances, and without deciding the question, whether the mere fact of being a Provisional Committee-man would have subjected him to any liability, that the name of A. B. was rightly inserted in the list of contributories of the company. — *In re The Direct Exeter, Plymouth, and Devonport Railway Company, Ex parte Besley*, 176.

4. The mere fact of being on the Provisional Committee of a company, does not make a party a joint contractor with those who act and make contracts, and, therefore, does not render him liable as a contributory within the meaning * of the Winding-up Acts. — *In* * 434

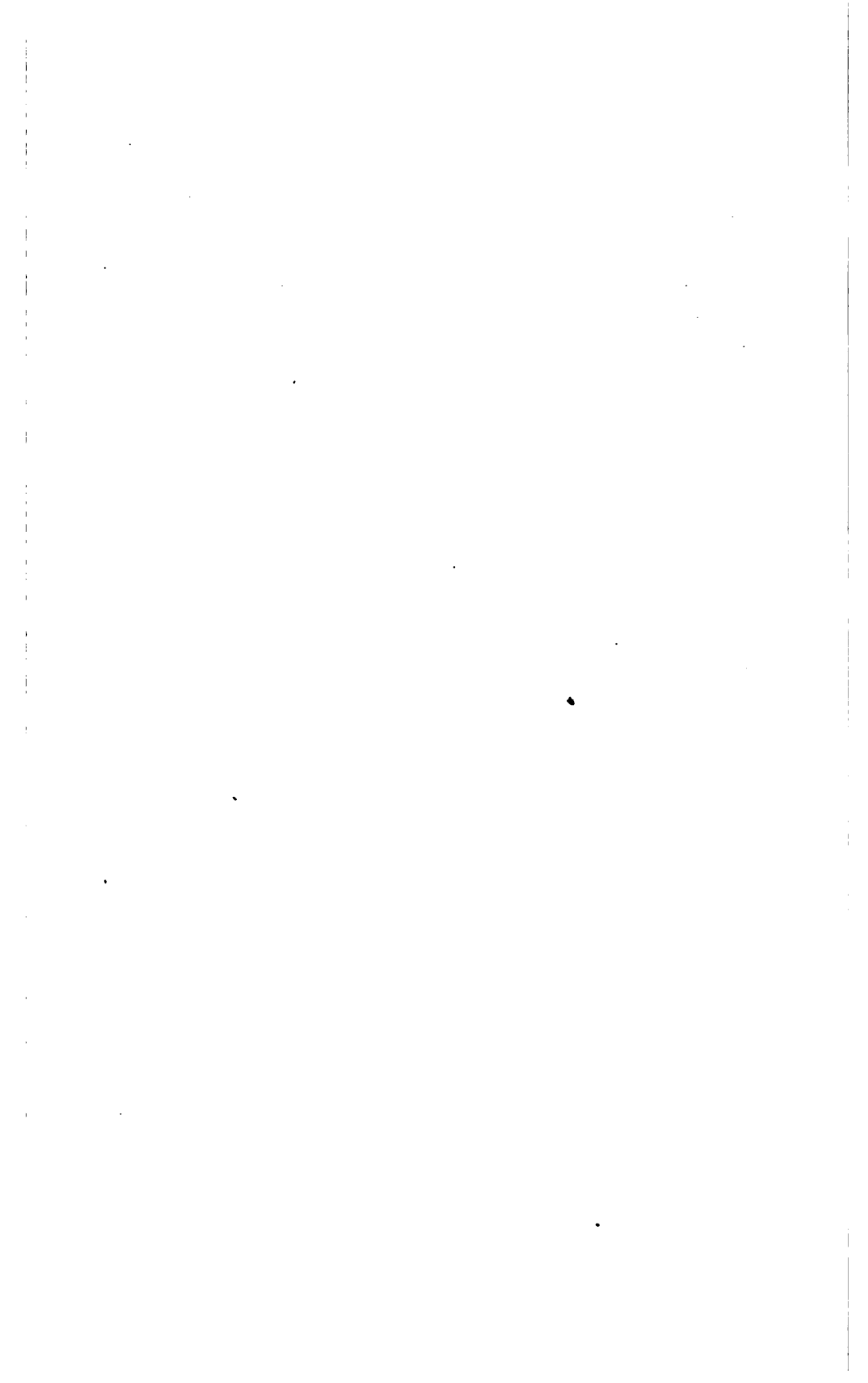
re The Wolverhampton, Chester, and Birkenhead Junction Railway Company, Ex parte Cottle, 185.

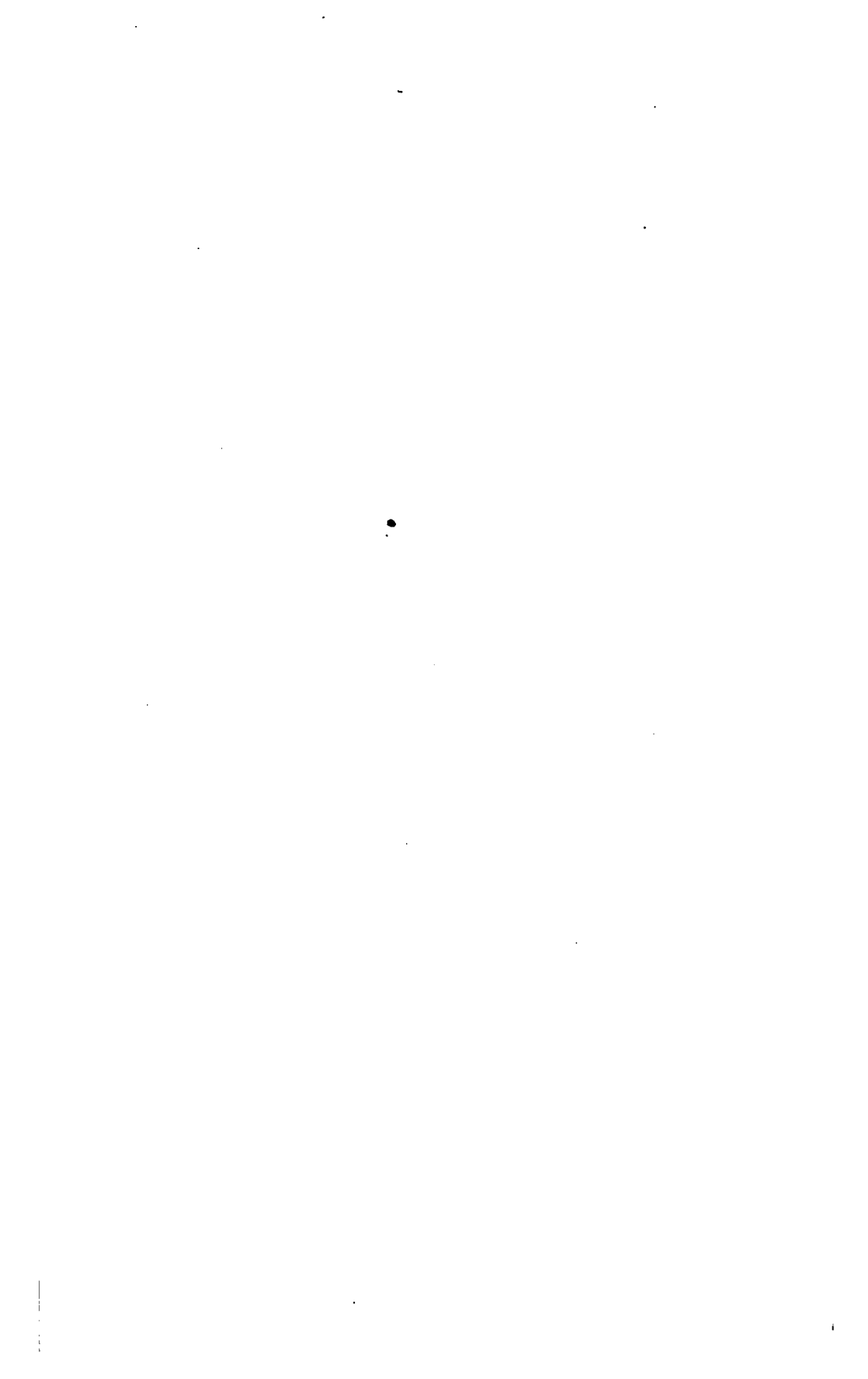
5. A. B. in a letter assenting to become one of the Provisional Committee of a railway company, expressly stated that this assent was to be taken subject to his approval of the plans and course of the line when definitely fixed upon, and so that he should be held free from all liabilities. His name was thereupon inserted in the list of the Provisional Committee; and he attended two meetings of the committee, but took no part whatever in the proceedings. At one of these meetings a committee of management was appointed. A. B. subsequently desired that his name might be struck out of the committee, and it was struck out accordingly. *Held*, under these circumstances, that the principle of the decision in the last case (*Ex parte Cottle*) applied, and that, independently of the stipulation contained in his letter, A. B. having neither expressly nor impliedly assented to any act affecting him with liability, the name of A. B. ought not to be inserted in the list of contributories of the company. — *In re The Direct Exeter, Plymouth, and Devonport Railway Company, Ex parte Roberts*, 192.

6. By the deed of settlement of a company, made between the persons referred to as named in a schedule stated to be annexed to the deed of the first part, and certain parties named and described of the second and third parts, it was provided that the directors might declare forfeited the shares of any party to the deed who did not execute it before a certain time specified; and also, that on any transfer of shares being made, the transferee should take upon himself all the antecedent liabilities of the transferor. There was no schedule to this deed, but it was executed by several other parties besides those of the second and third parts. A. B., an allottee of shares, paid his deposit and some calls, but did not execute the deed within the time limited, and the directors in consequence declared his shares forfeited, and carried them over to the share account of the company. A. B. submitted to this forfeiture, and never made any claim on the company. *Held*, that the name of A. B. was rightly excluded from the list of contributories of the company. — *In re Kollman's Railway Locomotive and Carriage Improvement Company, Ex parte Beresford*, 197.

7. A shareholder in a joint-stock company, the provisions of whose deed required that every transfer should be executed both by the transferor and transferee, sold his shares, the purchaser buying them on behalf of his son, and procuring the name of his son to be inserted * in the list of shareholders of the company. The transfer was executed by the vendor, but not by either the purchaser or his son. It appearing that the son, from the first, repudiated the shares; and that the purchaser never intended to accept them on his own account: *Held* (without deciding any question of liability between the vendor and the purchaser), that the vendor had not made a valid transfer of his shares, and was rightly placed on the list of contributories of the company. — *In re The St. George Steam Packet Company, Ex parte Hennessy*, 201.

WITNESS. See PRACTICE, 8.







Stanford Law Library



3 6105 062 803 320

PROPERTY OF THE
LELAND STANFORD JUNIOR UNIVERSITY